261 N.C. App.—No. 4 **Pages 541-775**

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 8, 2020

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[1]Sworn in 30 April 2019. [2]Sworn in 26 April 2019. [3]Died 28 August 2015. [4]Died 3 May 2015. [5]Died 30 January 2017. [6]Died 4 January 2015. [7]Died 27 January 2015. [8]Died 11 September 2015. [9]Resigned 24 March 2019. [10]Retired 1 April 2019.

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COURT OF APPEALS

CASES REPORTED

FILED 2 OCTOBER 2018

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Abandonment of issues—citation of legal authority—Where plaintiffs argued that the trial court's dismissal of their medical practice complaint pursuant to Rule 9(j) violated their due process rights but they failed to cite any legal authority to support their argument, the Court of Appeals deemed the issue abandoned. **Fairfield v. WakeMed, 569.**

Mootness—custody dispute—child reaching age of majority—An appeal in a custody action was dismissed as moot as to one child, because that child reached the age of eighteen during the pendency of the appeal and therefore was no longer a minor subject to custody disputes. **Chávez v. Wadlington, 541**.

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Misdemeanor child abuse—heroin use in presence of children—sufficiency of evidence—Although the State failed to prove a rock-like substance seized from defendant's hotel room was heroin so as to support a possession of heroin conviction, the trial court properly denied defendant's motion to dismiss a related charge of misdemeanor child abuse on the basis that she used heroin in the presence of her children. That charge did not require the State to prove the seized substance was heroin; evidence that defendant was found unconscious from an apparent drug overdose, her admission that she used heroin, and the presence of drug paraphernalia consistent with heroin use in the hotel room occupied by defendant and her children was sufficient to submit the charge to the jury. **State v. Osborne, 710.**

CHILD CUSTODY AND SUPPORT

Child support—frustration of appellate review—need for evidentiary hearing—failure to address all claims—The Court of Appeals vacated a child support order and remanded the matter for a new evidentiary hearing where the trial court failed to conduct sufficient evidentiary proceedings to support its findings and conclusions, made mathematical errors in its order, failed to address all of the mother's claims, and failed to make necessary findings for the mother's attorney fees claim. **Crews v. Paysour, 557.**

Modification of custody—loss of job—imputed income—motion pending for four years—A child support order was remanded where the dispute began when the father lost his job, he continued to pay the required support until he eventually unilaterally reduced the payments, he engaged in a lengthy job search, he eventually accepted a job at a reduced salary, and he got married and bought a new car and house. The original motion was pending for four years and the Court of Appeals could not determine whether the trial court imputed income to the father and the basis of the imputation for each time period. The matter was remanded for correction of the erroneous date of the father's settlement with his prior employer along with related appropriate corrections, and for the basis for any imputations of income. **Hill v. Hill, 600.**

Standing—"other person"—third-party non-parent—significant relationship over extensive period of time—act inconsistent with parent's constitutionally protected status—A third-party non-parent (plaintiff), who had been the live-in romantic partner of defendant-mother, lacked standing to seek custody of defendant-parents' biological children conceived and born during defendants' marriage. (Defendants had separated but never divorced.) Plaintiff's relationship with the children ended more than a year before she filed the custody complaint, when she evicted the children and their mother from her home. Furthermore, plaintiff never alleged that either defendant was unfit or engaged in conduct inconsistent with his or her constitutionally protected status as a parent. **Chávez v. Wadlington, 541.**

Support—modification—loss of job—depletion of estate—The trial court was not authorized to base a child support modification solely upon depletion of the husband's estate in a case in which a child support order was entered, the husband lost his job and engaged in a long job search during which he paid the child support obligation from his assets until his assets ran low, the husband eventually accepted a job at a lower salary, and four years elapsed from the motion to the hearing. Although depletion of the husband's estate may be a proper basis to establish an alimony

obligation, the same is not necessarily true for child support. The case was remanded for findings to clarify whether the trial court was actually imputing income and the basis for imputing income. **Hill v. Hill, 600.**

CHILD VISITATION

Civil contempt—custody order interpretation—implied forced visitation—In a contentious custody and visitation case in which a mother sought to hold a father in civil contempt because their teenage daughter was not returned to her physical custody, the Court of Appeals rejected the mother's argument that the trial court should have found the father in contempt for failing to force the daughter to adhere to the custody order's visitation schedule. Precedent did not establish a "forced visitation" rule, implied or otherwise. The trial court properly considered the best interests of the teenage daughter, who suffered from depression and self-harm and who expressed her preference not to visit with her mother, and the circumstances at the time of the hearing, before determining that the father was not in willful contempt. **Grissom v. Cohen, 576.**

Civil contempt—visitation provisions—willfulness—In a contentious custody and visitation case in which a mother sought to hold a father in civil contempt because their teenage daughter was not returned to her physical custody, the trial court did not misapprehend the law regarding custody and visitation when it found the father was not in willful contempt for failure to force his daughter to visit or return to her mother. The only way a trial court can enter a "forced visitation" order is under compelling circumstances, after giving the parties notice and an opportunity to be heard, and entering an order with findings and conclusions that take into account the best interests of the child; it would be a rare case in which physically forcing a child to visit or stay with a parent would be in that child's best interests. **Grissom v. Cohen, 576.**

CHURCHES AND RELIGION

Ecclesiastical matters—entanglement—church membership—Plaintiffs' removal from a church's membership was a core ecclesiastical matter, in which the trial court properly concluded it was barred from entangling the courts. **Lippard v. Diamond Hill Baptist Church, 660.**

CONSTITUTIONAL LAW

Effective assistance of counsel—not ripe for review—Defendant's claim of ineffective assistance of counsel in his trial for multiple drug offenses was dismissed without prejudice to his right to raise his claims in a motion for appropriate relief. **State v. Bice, 664.**

Effective assistance of counsel—principal State's witness—alleged failure to expose existence of immunity deal—In a prosecution for murder and robbery, defendant's trial counsel was not ineffective for failing to ensure the jury was informed that the principal witness against defendant could have been charged with first-degree murder based on felony murder but was not. Although defendant believed the witness's testimony was secured through an immunity agreement and that the witness received something of value in exchange for his testimony which affected his credibility, there was no evidence of such an agreement. Further, defense counsel attempted to elicit information about a deal and requested related jury instructions. **State v. McQueen, 703.**

CONTEMPT

Civil—failure to pay alimony and support—unilateral reduction—A trial court order holding a husband in contempt under N.C.G.S. § 5A-21(a) for failure to pay alimony and child support was remanded for a determination of arrearages and purge conditions where four years elapsed between the filing of a motion to modify and the hearing. In the interim, the husband lost his job, engaged in a long job search during which he paid the amounts owed from his assets, and eventually unilaterally reduced his payments. Although a supporting parent may file a motion to reduce his child support obligations, unilaterally reducing his payments entirely could subject him to contempt. Because of the time periods involved in this case, the reduction in alimony may not have been willful and it was possible that the husband was not in contempt for alimony if he was paying the new, reduced amount. **Hill v. Hill, 600.**

Civil—notice of noncompliance—argument waived—The husband in a child support and alimony matter waived any argument concerning notice of the acts for which he could be held in contempt when he actively participated in the trial without raising his objection. **Hill v. Hill, 600.**

Civil—show cause order—burden of proof—In a contentious custody and visitation case in which a mother sought to hold a father in civil contempt because their teenage daughter was not returned to her physical custody, the trial court's order finding the father not to be in contempt did not contain a misapprehension that the mother carried the burden of proof. Although the order included a conclusion of law confusingly referring to the mother as not having met "her burden," the hearing transcript demonstrated the trial court's understanding of the differences between civil and criminal contempt and the differences in the burden of proof between a motion for contempt and a show cause order. **Grissom v. Cohen, 576.**

CRIMINAL LAW

Jury instruction—drug trafficking—ultimate user exemption—Evidence at defendant's trial for drug trafficking was insufficient to support a jury instruction on an "ultimate user" exemption in the Controlled Substances Act, because defendant's written confession, corroborated by his trial testimony, stated that he possessed his father's oxycodone pills in order to sell them to pay his bills and that he had researched how much money to charge for them. **State v. Bice, 664.**

Post-conviction DNA testing—materiality—sufficiency of showing—Defendant's request for post-conviction DNA testing did not entitle him to the appointment of counsel under N.C.G.S. § 15A-269(c) where he failed to carry his burden of proving DNA testing would be material to his claim of wrongful conviction by providing no more than conclusory statements that new technology would be more accurate and probative of the identity of the perpetrator. **State v. Tilghman, 716.**

Post-conviction inventory of evidence—adequacy of request—The trial court did not err in denying defendant's post-conviction motion for DNA testing prior to obtaining an inventory of biological evidence where defendant's accompanying motion to locate and preserve evidence did not include an actual request for an inventory as required by N.C.G.S. § 15A-268, and thus was not presented to the trial court for a ruling. While defendant's motion for DNA testing was itself sufficient to trigger an inventory of evidence pursuant to N.C.G.S. § 15A-269, there was no indication the custodial agency was served with that motion. Even if it was the trial court's burden to ensure service upon the agency, the court's denial of the motion for DNA testing was not in error where defendant failed to sufficiently allege materiality. **State v. Tilghman, 716.**

CRIMINAL LAW—Continued

Prosecutor's closing argument—accountability to community—propriety— During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor's statements that the jurors should take into account the community's concerns and asking them to "handle this unfinished business" were not improper because they did not suggest the jury would be held accountable to the community's demands, but rather involved commonly held beliefs and were an attempt to motivate the jury to reach a just result. **State v. Wardrett, 735.**

Prosecutor's closing argument—matters outside the record—propriety— During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor did not improperly summarize a sequence of events involving defendant giving his gun to a friend to hide by saying defendant told his friend "man, get rid of this." Even though the phrase was not a direct quote, it represented a fair inference arising from the testimony. **State v. Wardrett, 735.**

Prosecutor's closing argument—name-calling—propriety—During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor's reference to defendant as one of a number of "fools" who participated in an altercation during which defendant fired a gun did not constitute an improper attack on defendant but was a fair commentary, based on the evidence, regarding reckless behavior. **State v. Wardrett, 735.**

Prosecutor's closing argument—personal belief of evidence—propriety— During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor improperly vouched for the truthfulness of the State's witnesses, but the statements were not grossly improper warranting a new trial, because the prosecutor made the statements to show the witnesses' relationships with defendant and how the witnesses tended to corroborate one another. **State v. Wardrett, 735.**

Prosecutor's closing argument—personal belief of guilt—propriety—During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor improperly stated that defendant was "absolutely guilty," but the statements did not deprive defendant of a fair trial where they followed the prosecutor's evaluation of the strength of the State's witnesses and did not suggest any perceived personal knowledge of the prosecutor. **State v. Wardrett, 735.**

DIVORCE

Alimony—calculation of amount—An award of alimony arrears was remanded for calculation of the correct amount owed. **Hill v. Hill, 600.**

DRUGS

Possession of heroin—identification of substance—sufficiency of evidence— The State failed to present sufficient evidence to prove defendant possessed heroin even though defendant told an investigating officer that she had ingested heroin, several investigating officers identified the substance seized in defendant's hotel room as heroin, a field test of the substance was positive for heroin, and drug paraphernalia typically used for heroin was found in the hotel room. Without evidence that a scientifically valid chemical analysis was performed to identify the seized substance as heroin, the State did not meet its burden of proof beyond a reasonable doubt. **State v. Osborne, 710.**

EMBEZZLEMENT

Entrustment of funds—supervisor's security device—The State presented sufficient evidence to convict defendant of embezzling funds from her employer where defendant was the director of accounting for a state university foundation and was entrusted with her own security device and her supervisor's security device, both of which were required in order to access the employer's funds. The bank's intent to require two foundation employees to participate in each transaction as a security measure did not negate the fact that defendant's employer entrusted her with its funds and both security devices. **State v. Grandy, 691.**

EVIDENCE

Character—other crimes, wrongs, or acts—photographs—guns—hand gestures—The trial court did not abuse its discretion by admitting photographs obtained from defendant's phone showing guns and showing defendant making certain hand gestures. Gun ownership is constitutionally protected and not indicative of bad character, and the hand gestures did not indicate gang affiliation despite defendant's argument otherwise. In any event, the trial court instructed the State not to ask any questions about signs or gang affiliation based on the photo of the hand gestures. **State v. Dixon, 676.**

Expert witness testimony—eyewitness identification—The trial court did not abuse its discretion by partially sustaining the State's objection to expert witness testimony on memory perception and eyewitness identification. The expert witness testified in a voir dire hearing that four factors were present that could affect the eyewitness identifications in this case, but the trial court ruled that two of them were such elementary, commonsense concepts and that expert testimony on those factors would be of no help to the jury. **State v. Vann, 724.**

Motions to suppress—oral findings of fact—sufficiency—In a first-degree murder trial, the trial court did not err by making oral findings of fact regarding multiple pretrial motions to suppress even though it had ordered the State to prepare written motions, which it failed to do, because there were no conflicts in the evidence requiring the court to make any findings of fact, much less written ones, and the detailed findings were sufficient to support the conclusions of law. While the trial court referred to its oral findings as "sketches" that could be supplemented with proposed findings offered by the parties, nothing in the record suggested the judge had not made up his mind or intended to enter a written order contrary to the facts found and conclusions already reached. **State v. Dixon, 676.**

Relevance—photographs—guns—location of shooting—The trial court did not abuse its discretion by admitting photographs showing guns and showing defendant making certain hand gestures, because the photographs were obtained from defendant's phone, showed he had access to firearms, and depicted him at nearly the same location where the shooting occurred, making them relevant to defendant's charges of felony murder and discharging a firearm into an occupied vehicle. **State v. Dixon, 676.**

Telephone conversation—Rule of Completeness—The trial court did not abuse its discretion in a prosecution for shooting a convenience store clerk by sustaining the State's objection to portions of defendant's jailhouse telephone call with his grandmother. Portions of the telephone call showing defendant's knowledge of the crime were admitted and defendant argued that other portions of the conversation

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

CHÁVEZ v. WADLINGTON

[261 N.C. App. 541 (2018)]

EMILY SUSANNA CHÁVEZ, PLAINTIFF
v.
SERENA SEBRING WADLINGTON AND
JOSEPH FITZGERALD WADLINGTON, DEFENDANTS

No. COA18-93

Filed 2 October 2018

1. Appeal and Error—mootness—custody dispute—child reaching age of majority

An appeal in a custody action was dismissed as moot as to one child, because that child reached the age of eighteen during the pendency of the appeal and therefore was no longer a minor subject to custody disputes.

2. Child Custody and Support—standing—"other person"—third-party non-parent—significant relationship over extensive period of time—act inconsistent with parent's constitutionally protected status

A third-party non-parent (plaintiff), who had been the live-in romantic partner of defendant-mother, lacked standing to seek custody of defendant-parents' biological children conceived and born during defendants' marriage. (Defendants had separated but never divorced.) Plaintiff's relationship with the children ended more than a year before she filed the custody complaint, when she evicted the children and their mother from her home. Furthermore, plaintiff never alleged that either defendant was unfit or engaged in conduct inconsistent with his or her constitutionally protected status as a parent.

Judge ARROWOOD dissenting.

Appeal by plaintiff from order entered 28 August 2017 by Judge Fred Battaglia, Jr. in Durham County District Court. Heard in the Court of Appeals 7 August 2018.

Collins Family Law Group, by Rebecca K. Watts, for plaintiff-appellant.

No brief filed on behalf of pro se defendant-appellees.

CALABRIA, Judge.

Emily Susanna Chávez ("plaintiff") appeals from the trial court's order dismissing her complaint for lack of subject matter jurisdiction pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2017). On appeal, plaintiff contends that the trial court erred by concluding that she lacked standing to seek custody of the biological children of Serena Sebring Wadlington and Joseph Fitzgerald Wadlington (collectively, "defendants"). After careful review, we affirm the trial court's order.

I. Factual and Procedural Background

Serena Sebring Wadlington ("mother") and Joseph Fitzgerald Wadlington ("father") are the biological parents of B.J.W., born 10 February 2000, and C.A.W., born 5 January 2003. Both B.J.W. and C.A.W. (collectively, "the children") were conceived and born during defendants' marriage. Although defendants separated in 2007, they never divorced. Therefore, defendants are still married today and have shared physical and legal custody of the children without a court order.

Around the time defendants separated, plaintiff and mother entered into a "long-term, committed and exclusive relationship" that lasted approximately seven years. During this time, mother and plaintiff resided together, with the children, when the children were not residing with father. While plaintiff and mother could not legally marry for much of their relationship, mother did not seek a divorce from father and did not pursue a legal marriage with plaintiff after same-sex marriage was recognized in North Carolina. During their relationship, plaintiff assisted mother with her child-rearing duties such as taking the children to school, accompanying them to appointments and activities, assisting them with schoolwork, and purchasing necessities for the children and the household.

On 4 March 2015, plaintiff and mother separated when plaintiff left the residence she shared with mother and the children. On 10 July 2015, plaintiff filed an action to evict mother and the children, which was dismissed. Approximately two weeks later, while mother was away on a work-related trip and the children were at a family reunion with father, plaintiff used self-help to change the locks, removed all of mother's and the children's belongings from the house, and placed their belongings in a storage unit. Plaintiff subsequently contacted the children, then aged 12 and 15. However, the children were unwilling to continue a relationship with plaintiff.

On 4 November 2016, plaintiff filed a complaint against defendants in Durham County District Court seeking shared physical and legal custody of the children. Plaintiff alleged, *inter alia*, that she "was centrally

involved in the care, upbringing and development" of the children during her relationship with mother, and that mother "intended to and did create a permanent parental relationship" between them. According to plaintiff, mother "acted inconsistently with her protected status as a parent by relinquishing her right to exclusive care and control of the minor children in granting parental status to [p]laintiff." Plaintiff further alleged that it would be in the children's best interests for plaintiff "to be involved in their lives on a regular basis."

On 1 August 2017, defendants filed a motion to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Defendants asserted that the trial court lacked subject matter jurisdiction because plaintiff lacked standing to seek custody of the children and failed to allege that defendants were unfit or had acted inconsistently with their constitutionally protected status as parents.

Following a hearing, on 28 August 2017, the trial court entered an order granting defendants' motion to dismiss. The court concluded, in pertinent part, that:

> 3. Plaintiff is not a parent and is not a *defacto* [sic] parent.
>
> 4. Defendants, as the biological and legal parents of the minor children, have a constitutionally protected right [to] the exclusive care, custody and control of their children under the Fourteenth Amendment to the Constitution of the United States.
>
> 5. Plaintiff has no standing to seek custody of Defendants' children as an "other person" pursuant to N.C.G.S. § 50-13.1(a) and NC Caselaw, to wit:
>
> > a. Plaintiff has no relationship with the minor children;
> >
> > b. Defendants and their children are an intact family, with no pending custody litigation between them;
> >
> > c. Neither Defendant has neglected, abused, or abandoned his/her children; and
> >
> > d. Neither Defendant has acted inconsistent with his/her constitutionally protected right as a parent.
>
> 6. Plaintiff has failed to allege or establish by clear and convincing evidence that either Defendant has engaged in conduct inconsistent with his/her constitutionally

protected right as a parent or otherwise forfeited his/her constitutionally protected status as a parent.

Plaintiff appeals.

II. Standing

On appeal, plaintiff argues that the trial court erred in dismissing her complaint for lack of standing. We disagree.

A. Standard of Review

"[O]n a motion to dismiss the facts are viewed in the light most favorable to the nonmovant, giving them the benefit of all plausible inferences." *Ellison v. Ramos*, 130 N.C. App. 389, 395, 502 S.E.2d 891, 895, *appeal dismissed and disc. review denied*, 349 N.C. 356, 517 S.E.2d 891 (1998). In custody cases, "the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003). "Unchallenged findings of fact are binding on appeal." *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011). Standing is a question of law which this Court reviews *de novo*. *Perdue v. Fuqua*, 195 N.C. App. 583, 585, 673 S.E.2d 145, 147 (2009) (citation and quotation marks omitted).

B. Discussion

Subject matter jurisdiction is "a court's power to hear a specific type of action, and is conferred upon the courts by either the North Carolina Constitution or by statute." *Yurek v. Shaffer*, 198 N.C. App. 67, 75, 678 S.E.2d 738, 744 (2009) (citation and quotation marks omitted). "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Myers v. Baldwin*, 205 N.C. App. 696, 698, 698 S.E.2d 108, 109 (2010) (citation omitted). "Plaintiffs have the burden of proving that standing exists." *Id.*

[1] In custody proceedings, standing is governed by N.C. Gen. Stat. § 50-13.1(a), which provides, in pertinent part, that "[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child[.]" Here, since plaintiff is neither a natural parent nor a relative of the children, she claims a right to custody as an "other person" pursuant to N.C. Gen. Stat. § 50-13.1(a). However, B.J.W. turned 18 years old on 10 February 2018, and is therefore no longer a "minor child" subject to custody disputes. *See* N.C. Gen. Stat. § 48A-2 ("A minor is any person who has not reached the age of 18 years."). Accordingly, plaintiff's appeal is

moot with regards to B.J.W. and "should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). Therefore, we dismiss plaintiff's appeal as to B.J.W. and consider plaintiff's standing as an "other person" only insofar as C.A.W. is concerned.

[2] Despite the broad language of N.C. Gen. Stat. § 50-13.1(a), "our Supreme Court has indicated that there are limits on the 'other persons' who can bring" an action for custody. *Myers*, 205 N.C. App. at 698, 698 S.E.2d at 110 (citation and quotation marks omitted). The statute "was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers. Such a right would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children." *Petersen v. Rogers*, 337 N.C. 397, 406, 445 S.E.2d 901, 906 (1994).

"[T]he relationship between the third party and the child is the relevant consideration for the standing determination" in custody disputes between non-parent third parties and natural parents. *Ellison*, 130 N.C. App. at 394, 502 S.E.2d at 894. "[A] relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing." *Id.*

"No appellate court in North Carolina has attempted to draw any bright lines for how long the period of time needs to be or how many parental obligations the person must have assumed in order to trigger standing against a parent[.]" *Myers*, 205 N.C. App. at 699, 698 S.E.2d at 110 (citation and quotation marks omitted). However, the cases in which this Court has determined that a third party had standing to seek custody against a natural parent have "involved significant relationships over extensive periods of time." *Id.*; *see, e.g.*, *Moriggia v. Castelo*, __ N.C. App. __, __, __, 805 S.E.2d 378, 379, 389 (2017) (holding that the trial court erred by concluding that the plaintiff lacked standing to seek custody of a minor child born 11 June 2013 to the parties, "a lesbian couple who never married but [who] were in a committed and loving relationship from January 2006 until October 2014" and "decided during the relationship to have a child" together (internal quotation marks omitted)); *Mason v. Dwinnell*, 190 N.C. App. 209, 220, 660 S.E.2d 58, 65 (2008) (holding that the plaintiff had standing to pursue custody where she alleged that she and the defendant "jointly raised the child; they entered into an agreement in which they each acknowledged that [the plaintiff] was a *de facto* parent and had 'formed a psychological parenting relationship with the parties' child;' and 'the minor child has lived all

his life enjoying the equal participation of both [the plaintiff] and [the defendant] in his emotional and financial care and support, guidance and decision-making' "); *Ellison*, 130 N.C. App. at 396, 502 S.E.2d at 895 (determining that the third-party plaintiff had standing to seek custody where she alleged that she was "the only mother the minor child has known" and that during her five-year relationship with the defendant-father, she "was the responsible parent . . . who took the minor child to her medical appointments, to school, attended teacher conferences, took the minor child for diabetic treatment and counseling, . . . and bought all the child's necessities" (internal quotation marks omitted)).

Furthermore, a non-parent who seeks custody against a natural parent must also allege "some act inconsistent with the parent's constitutionally protected status." *Yurek*, 198 N.C. App. at 75, 678 S.E.2d at 744 (citations omitted). The acts alleged "*are not* required to be 'bad acts' that would endanger the children." *Moriggia*, __ N.C. App. at __, 805 S.E.2d at 385 (citation and quotation marks omitted). But "absent a showing . . . that the natural parents are unfit, have neglected the welfare of the child, or have acted in a manner inconsistent with the paramount status provided by the Constitution, the [non-parent] does not have standing." *Perdue*, 195 N.C. App. at 586-87, 673 S.E.2d at 148.

In the instant case, the trial court concluded that plaintiff lacked standing to seek custody of defendants' children. The court found, in relevant part, that:

> 11. [Mother] is the biological and legal mother of the two minor children, who are at issue in this matter[.] . . . [Father] is the biological and legal father of said children, who were both conceived and born during the marriage of Defendants.
>
> 12. Defendants separated in December 2007, when their youngest child . . . was five (5) years old; however, the Defendants have never divorced, and remain married to one another.
>
> 13. Defendants have shared legal and physical custody of their minor children since their separation, in a peaceful and cooperative manner. They have agreed upon a custodial schedule, and have agreed on modifications to that schedule over the years when it was necessary. The Defendants have shared legal and physical custody of their children so well that it has never been necessary

for either Defendant to seek a Court Order regarding the custody of their children.

. . . .

17. Plaintiff was never a legal step-parent to Defendants' children. Initially, this was partially because that particular legal status was not available to her in North Carolina. However, after same-sex marriage was authorized and recognized in North Carolina, [Mother] did not divorce [Father] . . . to marry Plaintiff. Plaintiff merely remained the live-in romantic partner of Mother.

18. While residing together, Plaintiff assisted Mother with her daily child-rearing duties, such as voluntarily taking them to/from various appointments and activities, assisting them with schoolwork, and purchasing some necessities for the minor children. As such, Plaintiff was involved in the children['s] care and upbringing, and had a positive and healthy relationship with the children.

19. Plaintiff and Mother separated on March 4, 2015, when Plaintiff left the residence she shared with Mother and the children.

20. On or about July 10, 2015, Plaintiff filed a lawsuit to evict Mother and the children from the residence. Said action was dismissed. Shortly thereafter (approximately 2 weeks later), while Mother was away on a business trip and the children were with Father, Plaintiff used self-help to change the locks, and removed all of Mother's belongings and the children's belongings from their residence, and placed their items in storage. Plaintiff then moved back into the residence, once occupied by Plaintiff and Mother. At that point, the relationship between Plaintiff and the children ended.

. . . .

24. After Plaintiff locked mother and the children out in July of 2015, Plaintiff did not seek to resume her relationship with the children. Since July 2015, Plaintiff has not had a relationship with the children.

25. Since each of their respective births, the children have always resided with Mother and/or Father. Neither Defendant has ever abandoned their children.

. . . .

27. On its face, Plaintiff's Complaint fails to allege facts sufficient to give Plaintiff third-party standing to bring an action for custody.

28. In her Complaint filed on November 4, 2016, Plaintiff alleged facts consistent with a conclusion that she had a "parent-child relationship" with Defendants' children, while she and Mother resided together. Plaintiff then added conclusory statements (no factual allegations asserted) that [mother] had acted inconsistent with her parental rights, asserting that this Court had jurisdiction to decide custody of Defendants' children on the "best interests" standard.

29. Plaintiff did not and does not allege that either Defendant is unfit or has abandoned or neglected their children.

30. Neither Defendant is unfit or has abandoned or neglected their children.

31. Plaintiff did not and does not allege that Father has acted in a manner inconsistent with his constitutionally protected status as a parent.

32. Neither Defendant has acted in a manner inconsistent with his/her constitutionally protected status as a parent.

Plaintiff contends that she established standing as an "other person" pursuant to N.C. Gen. Stat. § 50-13.1(a) because she sufficiently alleged a parent-child relationship with the children. Plaintiff further contends that "[t]he issue of whether [defendants] acted inconsistently with their protected status is **not** relevant to the question of standing or to the issue of subject matter jurisdiction." Plaintiff is incorrect on both counts.

Taken as true and viewed in the light most favorable to plaintiff, the allegations in plaintiff's complaint demonstrate that she had a parent-child relationship with the children during her relationship with mother. We do not doubt that there was genuine love and affection between plaintiff and the children during those years; indeed, mother acknowledged as much during the hearing. Nevertheless, "standing is measured at the time the pleadings are filed." *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 123, 674 S.E.2d 775, 778 (2009). Thus, "when standing is questioned, the proper inquiry is whether an actual

controversy existed when the party filed the relevant pleading." *Id.* (citation, quotation marks, and brackets omitted).

According to the trial court's unchallenged findings of fact 20 and 24, plaintiff's relationship with the children ended in July 2015 when she evicted them from the residence. This fact defeats plaintiff's standing as an "other person." Regardless of the parties' prior relationship, "a third party who has no relationship with a child does not have standing under N.C. Gen. Stat. § 50-13.1 to seek custody of a child from a natural parent." *Ellison*, 130 N.C. App. at 394, 502 S.E.2d at 894.

The dissent, however, contends that the fact that "plaintiff's relationship with the children ended in July 2015 . . . does not prevent plaintiff from establishing a parent-child relationship for the purposes of standing in a child custody case." According to the dissent,

> [i]ntentions after the ending of the relationship between the parties are not relevant because the right of the legal parent does not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the party's separation she regretted having done so.

Estroff v. Chatterjee, 190 N.C. App. 61, 70-71, 660 S.E.2d 73, 79 (2008) (citation, internal quotation marks, and alterations omitted).

Significantly, however, standing was not at issue in *Estroff*. *See id.* at 75 n.2, 660 S.E.2d at 81 n.2 (noting that "the trial court necessarily concluded twice that [the plaintiff] had standing, and there is no need for us to address the issue" where the trial court, "in its 3 August 2005 order, denied [the defendant's] motion to dismiss for lack of standing and, in its 17 November 2006 order, concluded that it had personal and subject matter jurisdiction" (quotation marks and original emphasis omitted)). Furthermore, this portion of *Estroff* pertains not to *the existence* of a parent-like relationship between the third party and the minor child, but rather to *the method* by which the third party gained such authority—i.e., the issue of whether the natural parent has acted inconsistently with his or her constitutionally protected rights. *See id.* at 75, 660 S.E.2d at 81-82 (explaining that "the focus is not on what others thought of the couple or what responsibility [the plaintiff] elected to assume, but rather whether [the defendant] chose to cede to [the plaintiff] a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with her child" (citation, quotation marks, and original alterations omitted)).

As the dissent recognizes, defendants' constitutionally protected parental rights and plaintiff's standing as an "other person" pursuant to N.C. Gen. Stat. § 50-13.1(a) are not wholly independent issues. The statute does not exist in a vacuum. *See Perdue*, 195 N.C. App. at 586, 673 S.E.2d at 148 ("While this Court recognizes that intervenor satisfies the definition of 'other person' because she was the primary caregiver since birth and she had a close familial relationship with the minor child, the grandmother is still required to allege parental unfitness."). However, the dissent conflates the significance of the constitutional issue as it relates to plaintiff's standing versus the merits of her custody claim. Although relevant to both inquiries, "standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." *Id.* at 585, 673 S.E.2d at 147 (citation and quotation marks omitted). As a non-parent third party, plaintiff lacks standing to seek custody unless she overcomes the presumption that defendants have "the superior right to the care, custody, and control" of the children. *Id.* at 586, 673 S.E.2d at 148 (citing *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905).

Plaintiff failed to overcome this presumption. Plaintiff has never alleged that either defendant is unfit or has abandoned or neglected the children. According to the trial court's finding of fact 31, plaintiff's complaint does not allege that father acted inconsistently with his protected status as a parent. Therefore, even assuming, *arguendo*, that plaintiff alleged facts sufficient to overcome mother's *Petersen* presumption, father's rights as a natural parent remain superior to those of a non-parent. *Id.*; *see also Brewer v. Brewer*, 139 N.C. App. 222, 232, 533 S.E.2d 541, 549 (2000) ("[A] parent who voluntarily gave custody to the other parent and has never been adjudged unfit does not lose [their] *Petersen* presumption against a non-parent third party so long as the non-parent third party does not have court-ordered custody.").

Plaintiff also argues that the trial court's dismissal of her complaint for lack of subject matter jurisdiction was procedurally improper, in that certain of the court's findings are "relevant only to a Rule 12(b)(6) analysis." This elevates form over substance. As plaintiff recognizes, standing is necessary to survive motions to dismiss for lack of subject matter jurisdiction *or* failure to state a claim. *See Moriggia* __ N.C. App. at __, 805 S.E.2d at 384 ("Standing concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss." (citation and quotation marks omitted)); *see also Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003) ("A lack of standing may be challenged by [a] motion to dismiss for

failure to state a claim upon which relief may be granted." (citation and quotation marks omitted)). However, regardless of the procedural posture in which the issue arises, "[i]f a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Perdue*, 195 N.C. App. at 587, 673 S.E.2d at 148 (citation and quotation marks omitted). "Without jurisdiction the trial court must dismiss all claims brought by the [plaintiff]." *Id.*

III. Conclusion

Plaintiff has not had a relationship with the children since July 2015. Furthermore, according to the trial court, plaintiff failed to allege or establish clear and convincing evidence that either defendant was unfit or engaged in conduct inconsistent with his or her constitutionally protected status as a parent. Therefore, the trial court did not err by concluding that plaintiff lacks standing to seek custody of the children, and we affirm the order dismissing her complaint for lack of subject matter jurisdiction. Since the issue of standing is dispositive, we need not address plaintiff's remaining arguments.

AFFIRMED.

Judge MURPHY concurs.

Judge ARROWOOD dissents in a separate opinion.

ARROWOOD, Judge, dissenting.

The majority holds that the trial court did not err by dismissing Emily Susanna Chavez ("plaintiff")'s complaint for shared custody of Serena Sebring Wadlington and Joseph Fitzgerald Wadlington (collectively, "defendants")'s biological children pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure because it concluded plaintiff lacked standing to seek custody of C.A.W. I respectfully dissent.

I believe plaintiff alleged sufficient facts to have standing as to C.A.W. However, I offer no opinion as to whether she may ultimately prevail. "Standing concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss. Our review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*." *Moriggia v. Castelo*, __ N.C. App. __, __, 805 S.E.2d 378, 384 (2017) (citation and internal quotation marks omitted). In determining standing, our Court "may consider matters outside the pleadings."

Harris v. Matthews, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (citations omitted).

Standing for an individual to bring an action for child custody is governed by N.C. Gen. Stat. § 50-13.1(a), which provides that "[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided." N.C. Gen. Stat. § 50-13.1(a) (2017). However, "there are limits on the 'other persons' who can bring such an action. A conclusion otherwise would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children." *Mason v. Dwinnell*, 190 N.C. App. 209, 219, 660 S.E.2d 58, 65 (2008) (internal quotation marks and citation omitted).

In *Ellison v. Ramos*, 130 N.C. App. 389, 502 S.E.2d 891 (1998), our Court held "that a relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing." *Id.* at 394, 502 S.E.2d at 894. Subsequently, our General Assembly mandated in N.C. Gen. Stat. § 50-13.2(a) "that disputes over custody be resolved solely by application of the 'best interest of the child' standard." *Estroff v. Chatterjee*, 190 N.C. App. 61, 63, 660 S.E.2d 73, 75 (2008). However, before the best interest of the child standard can be used as between a legal parent and a third party, "our federal and state constitutions, as construed by the United States and North Carolina Supreme Courts" require that "the evidence establishes that the legal parent acted in a manner inconsistent with his or her constitutionally-protected status as a parent." *Id.* at 63-64, 660 S.E.2d at 75 (citing *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997)). Thus, a party seeking custody must now "allege facts demonstrating a sufficient relationship with the child and then must demonstrate that the parent has acted in a manner inconsistent with his or her protected status as a parent." *Moriggia*, __ N.C. App. at __, 805 S.E.2d at 385. Here, the majority holds that plaintiff failed to both (1) sufficiently allege a parent-child relationship with the children, and (2) allege facts sufficient to overcome the natural parents' constitutionally protected status. I disagree.

I. Parent-Child Relationship

The majority first holds that plaintiff's allegations, taken as true and viewed in the light most favorable to the plaintiff, demonstrate that she had a parent-child relationship with the children while in a relationship with defendant mother, but that plaintiff's relationship with the children ended in July 2015 when she evicted them and their mother from the

residence, and, thus, plaintiff did not sufficiently allege a parent-child relationship. Although our Court is bound by unchallenged findings of fact 20 and 24, that the plaintiff's relationship with the children ended in July 2015, this does not prevent plaintiff from establishing a parent-child relationship for the purposes of standing in a child custody case. We must also consider the parties' actions during the relationship of plaintiff and defendant mother, as:

> the actions and intentions during the relationship of the parties, during the planning of the family, and before the estrangement carry more weight than those at the end of the relationship since . . . "[i]ntentions after the ending of the relationship between the parties are not relevant because the right of the legal parent does not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the party's separation she regretted having done so."

Moriggia, __ N.C. App. at __, 805 S.E.2d at 387 (quoting *Estroff*, 190 N.C. App. at 70-71, 660 S.E.2d at 79 (citation and internal quotation marks omitted)). Although *Moriggia* considers whether the natural parent acted inconsistently with his or her paternal rights so as to establish standing, I would hold that the fact that a legal parent does not have the right to erase a parent-child relationship between her partner and her child which she created and fostered during the relationship is also relevant here.

Here, plaintiff alleges, and the trial court found as fact, that she was in a long-term, committed, and exclusive relationship with defendant mother for approximately seven years, making public vows of commitment in May 2012. Plaintiff alleged she was "involved in the care, upbringing and development of the minor children throughout her relationship with" defendant mother, and that it was defendant mother's intent to create a permanent relationship between plaintiff and the children. She also alleged that she "and [d]efendant [m]other publically held themselves out as the . . . children's parents[,]" and defendant mother delegated parental responsibilities to plaintiff, including: taking the children to appointments and activities, assisting with schoolwork, providing emotional stability, having decision-making authority regarding the children, and purchasing necessities for the children. I would hold that these allegations, taken as true and in the light most favorable to plaintiff, are sufficient to establish plaintiff had a parent-child relationship with defendants' children.

Nonetheless, the majority holds that these allegations are irrelevant to our inquiry because "standing is measured at the time the pleadings are filed," *see Quesinberry v. Quesinberry*, 196 N.C. App. 118, 123, 674 S.E.2d 775, 778 (2009), and the trial court found plaintiff's relationship with the children ended in July 2015 once they were evicted from plaintiff's house. However, considering whether plaintiff had a parent-child relationship with defendants' children before plaintiff's separation from defendant is not contrary to the principle that "standing is measured at the time the pleadings are filed[,]" *id.*, as "the right of the legal parent does not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the party's separation she regretted having done so." *Moriggia*, __ N.C. App. at __, 805 S.E.2d at 387 (citation, internal quotation marks, and emphasis omitted).

Accordingly, I would hold that defendant mother cannot erase the parent-child relationship by removing the children from plaintiff's life after her separation from plaintiff. Therefore, our Court should also consider the parent-child relationship that existed before the termination of plaintiff and defendant mother's relationship led to the eviction of defendant and the children from plaintiff's house and plaintiff's inability to maintain her relationship with the children. As a result, I would hold that plaintiff's allegations, taken as true and in the light most favorable to plaintiff, are sufficient to establish plaintiff had a parent-child relationship with defendants' children.

II. Actions Inconsistent with Parental Rights

Although plaintiff incorrectly alleges on appeal that she does not need to allege that defendants acted inconsistently with their parental rights to establish standing, she also argues in the alternative that her allegations demonstrate that defendants acted inconsistently with their protected status as a parent by relinquishing their right to exclusive care and control of the children by granting plaintiff parental rights when defendant mother voluntarily and intentionally created a family unit and "a parent-like relationship between [p]laintiff and the" children.

In *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), our Supreme Court held "that absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail" in a dispute with a non-parent. *Id.* at 403-404, 445 S.E.2d at 905. However, "[i]n *Price*, the Supreme Court expanded on what constitutes unfitness or neglect by holding that conduct inconsistent

with a parent's constitutionally protected status would lead to the application of the best interests of the child standard." *Brewer v. Brewer*, 139 N.C. App. 222, 229, 533 S.E.2d 541, 547 (2000) (citing *Price*, 346 N.C. at 79, 484 S.E.2d at 534). Our Court has held that a parent acts inconsistently with his or her protected status as a parent by relinquishing the right to exclusive care and control of a child by granting parental status to a third party. *Estroff*, 190 N.C. App. at 70, 660 S.E.2d at 78 (citation omitted). Thus, when a legal parent invites a third party into a child's life and cedes to the third party a significant amount of parental responsibility, the parent cannot later "assert those rights in order to unilaterally alter the relationship between her child and the person whom she transformed into a parent." *Id.* (citation omitted).

Here, plaintiff's allegations and the trial court's uncontested findings of fact tend to show that plaintiff and defendant mother were in a committed relationship and raised defendant mother's children together for five years. They lived as a family unit until the relationship ended. When they ultimately separated, defendant mother's intentions changed, but she had already created a family unit that included plaintiff. Thus, I would hold plaintiff alleged facts sufficient to overcome the mother's *Petersen* presumption.

However, the majority holds that even assuming *arguendo*, plaintiff alleged facts sufficient to overcome defendant mother's *Petersen* presumption, the trial court found that plaintiff's complaint does not allege the father acted inconsistently with his protected status; thus, the father's rights remain superior to those of a non-parent. The majority relies on *Brewer* to support this holding.

In *Brewer*, the biological father of two children entered into a consent order with the children's biological mother that granted him custody. *Brewer*, 139 N.C. App. at 224, 533 S.E.2d at 544. Thereafter, the father unilaterally allowed the children to live with their paternal aunt and uncle. *Id.* The biological mother was unaware of this change. *Id.* at 231, 533 S.E.2d at 548. Subsequently, the paternal aunt and uncle filed an action to obtain permanent legal custody of the children. *Id.* at 224, 533 S.E.2d at 544. The trial court granted the paternal aunt and uncle temporary custody in an *ex parte* order. *Id.* The biological mother then moved to vacate this order, asking the court to grant her custody of the children. *Id.* The court awarded the biological mother custody of the children. *Id.* The paternal aunt and uncle appealed. *Id.*

In reviewing the trial court's decision, the Court was careful to distinguish the case from cases where "a parent loses her *Petersen*

presumption if she loses custody to a non-party in a court proceeding or consent order." *Id.* at 230, 533 S.E.2d at 548. Moreover, the Court specified the case did "not present a question where the moving parent either voluntarily or involuntarily lost custody to a non-parent third party. [The biological mother] never surrendered custody of her children to the non-parent plaintiffs . . . [she], through no fault of her own was unaware where the children were." *Id.* at 231, 533 S.E.2d at 548.

In light of the circumstances before it, the Court held: a natural parent should maintain her "*Petersen* presumption against a non-parent where the parent had voluntarily relinquished custody to the other parent, had never voluntarily or involuntarily relinquished custody to a non-parent, had never been adjudged unfit, and had never acted in a manner inconsistent with her protected parental status." *Id.* at 232, 533 S.E.2d at 548. The Court then specifically emphasized this holding "is limited *strictly* to the facts presented by this case." *Id.* at 232, 533 S.E.2d at 549 (emphasis added).

Our Court's caution in limiting *Brewer* is well-justified, given that "cases in this area present a vast number of unforeseen fact patterns." *Id.* (citing *Ellison*, 130 N.C. App. at 395, 502 S.E.2d at 894-95). Thus, I believe that relying on *Brewer* in a case where the defendant father saw the children regularly and "never abandoned" the children during the course of defendant mother's relationship with plaintiff impermissibly expands *Brewer*, a case where the biological mother was unaware the children were living with non-parents through no fault of her own.

Admittedly, the complaint in this case fails to specifically allege that defendant father abrogated his constitutionally protected status. However, our Court may look outside the pleadings in reviewing a Rule 12(b)(1) ruling. *Harris*, 361 N.C. at 271, 643 S.E.2d at 570; *see Cunningham v. Selman*, 201 N.C. App. 270, 280, 689 S.E.2d 517, 524 (2009) ("Unlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." (citation, quotation marks, and alterations omitted)).

Here, the trial court held an evidentiary hearing, during which plaintiff repeatedly contended that both parents abrogated their constitutionally protected status by granting her the status of a parent. The trial court called defendant mother to the stand on the issue of standing. Defendant mother testified that she and plaintiff co-parented the children for five years, and that defendant father "had a good relationship with the children" at all times. She stated he "is the other primary

parent to them" and saw the children regularly while she was in a relationship with plaintiff. Thus, the record makes it evident that defendant father was in a position to know that defendant mother held plaintiff out as a parent, and also intentionally created a parent-child relationship between plaintiff and the children.

This evidence and plaintiff's allegations at the hearing undermine a key finding of fact in the trial court's order that "[p]laintiff did not and does not allege that Father has acted in a manner inconsistent with his constitutionally protected status as a parent." Moreover, I would hold that the pleadings and defendant mother's testimony was sufficient to show by clear and convincing evidence that defendant father acted in a manner inconsistent with his constitutionally protected status because, unlike *Brewer*, he was in circumstances where it was apparent defendant mother created a parent-child relationship with plaintiff and his children. Despite this change, defendant father never took issue with the custody arrangement, sharing custody "in a peaceful and cooperative manner" with defendant mother since their separation.

Based on the circumstances before the Court, I would hold plaintiff had standing to seek custody of C.A.W. Accordingly, I would reverse the trial court's order dismissing for lack of subject matter jurisdiction.

WILLIAM S. CREWS, JR., PLAINTIFF
v.
NYSA MARINDA PAYSOUR, DEFENDANT

No. COA18-72

Filed 2 October 2018

Child Custody and Support—child support—frustration of appellate review—need for evidentiary hearing—failure to address all claims

The Court of Appeals vacated a child support order and remanded the matter for a new evidentiary hearing where the trial court failed to conduct sufficient evidentiary proceedings to support its findings and conclusions, made mathematical errors in its order, failed to address all of the mother's claims, and failed to make necessary findings for the mother's attorney fees claim.

Appeal by defendant from orders entered 7 August 2017 by Judge G. Galen Braddy in District Court, Pitt County. Heard in the Court of Appeals 5 September 2018.

Kurtz Evans Whitley Guy & Simos, PLLC, by Jon B. Kurtz, for plaintiff-appellee.

Tharrington Smith, LLP, by Steve Mansbery, for defendant-appellant.

STROUD, Judge.

Defendant appeals from an order establishing child support. The trial court limited the presentation of evidence based upon a misapprehension of the law at the only evidentiary hearing held in this case and received no additional evidence on remand, and both parties have requested remand based upon several errors in the order. The trial court also made findings of fact and conclusions of law on remand regarding the time period after the hearing without receiving any new evidence. We vacate the order and remand for a new evidentiary hearing and new order establishing child support and addressing the other issues discussed below, including birth expenses, attorney fees, and any reimbursement or arrears of past prospective child support payments needed based upon plaintiff-father's actual payments made prior to the hearing on remand and the child support as established by the new order on remand.

I. Background

The background of this case may be found in *Crews v. Paysour*,

> Plaintiff William S. Crews, Jr. and Defendant Nysa Marinda Paysour are the parents of a minor child, but were never married. On 7 March 2012, Crews filed a complaint for child custody and child support. On 13 August 2012, the trial court entered an order for child support titled "Temporary IV-D Order" which stated this order is a temporary order for support by consent of parties and that both parties shall return to court
>
> Applying the North Carolina Child Support Guidelines, the court ordered Crews to pay $898.00 per month in child support. This figure was based on Crews's gross monthly income of $4,331.67.

___N.C. App. ___, ___, 797 S.E.2d 380, *2-3 (March 21, 2017) (COA16-604) (unpublished) (quotation marks and brackets omitted) ("*Crews I*").

Defendant-mother ("Mother") and plaintiff-father ("Father") were in medical school when a temporary child support order was entered in 2012; the income of both parties increased substantially after they completed their residencies.

> On 5 May 2014, Paysour filed a notice of hearing for permanent child support and permanent custody. The trial court held that hearing on 30 September 2014 and heard evidence on the parties' incomes, expenses and other information relevant to the award of child support. After the hearing, the trial court sent a letter dated 4 December 2014 to the parties' counsel with a "Rendition of Judgment" from the child support hearing but not a written order awarding permanent child support.
>
> Ultimately, the parties scheduled a conference with the court on 22 October 2015 regarding the entry of a written child support order. At the conference, the parties discussed the 4 December 2014 letter from the court and their draft proposed orders. The parties later submitted additional proposed orders and objections.
>
> On 7 December 2015, the trial court entered a permanent child support order. In the order, the trial court made findings regarding both parties' incomes and expenses. The trial court ordered Crews to pay $3,037.00 per month in child support prospectively, and $23,529.00 in child support arrears for the period from December 2014 through October 2015, to be paid in monthly installments of $750.00. Crews timely appealed.

Id. at *3-4.

Crews I was based upon Father's appeal from the 7 December 2015 child support order but it did not address all of the issues he raised. *See id.* at *5-7. Mother conceded some errors argued by Father in his appeal. *See id.* at *6. *Crews I* did *not* address the details of Father's "series of arguments concerning the trial court's findings and resulting calculations concerning his child support obligations." *Id.* at *5.

The first issue addressed in *Crews I* was Father's argument regarding the trial court's subject matter jurisdiction to modify child support award; we determined the trial court had subject matter jurisdiction to act. *See id.* at *4-5. The second issue addressed in *Crews I* was the calculation of non-guideline child support, but instead of addressing the details

of Father's arguments regarding the findings of fact of the numbers used in the calculation and how the support was calculated, we vacated the child support order and remanded for entry of a new order "because the trial court's order expressly indicate[d] that the court was operating under a misapprehension of the law—a fact conceded by [Mother] on appeal." *Id.* at *5-6. This Court did not address the details of the arguments regarding the actual calculation of the child support, because "[t]he trial court's analysis of those issues may be different when applying the proper legal standard for a child support award in a high-income case such as this one." *Id.* at *7. We also directed that "[o]n remand, the trial court is free to decide, in its discretion, whether additional evidence or a hearing is necessary, or whether the case may be decided based on the existing record." *Id.* On remand, the trial court did not receive any additional evidence, but counsel for both parties presented arguments regarding their proposed calculations of child support.

Mother appealed from the order on remand, and once again, in this appeal, although Mother is now the appellant and Father did not cross appeal, both parties note various errors in the trial court's calculation of child support, and Father concedes that the order must be remanded at least on some issues.

It is apparent from the record that much of the difficulty in this child support order was caused by the delay in entry of an order, and certainly the passage of more time for appeals has only made matters worse. The child support hearing was held on 30 September 2014; this was the only evidentiary hearing. On 22 October 2015, a hearing was held to address the fact that it was thirteen months after the hearing and no order had been entered. The first order was entered 7 December 2015, over a year after the hearing. The order on remand was entered almost three years after the hearing. At the time of this opinion, over four years have passed since the hearing. Based upon the variety of issues arising from the trial court's order and the need to remand, we will address a few key concerns of this Court.

II. Lack of Competent Evidence

Here, the trial court did not receive any evidence on remand, but despite the lack of evidence entered findings of fact regarding child support payments. Mother challenges these findings of fact as unsupported by the evidence, and since the only evidentiary hearing was in September 2014, any findings about any events after September 2014 are obviously unsupported by the record. At the hearing on remand in May of 2017, the trial court discussed the child support payments since the

first order with counsel and counsel informed the court about these payments since the prior order. And although counsel *discussed* the issue with the trial court, the parties did not stipulate to amounts paid since the prior order or agree on how any overpayment by Father should be addressed. And arguments of counsel are not evidence: "[I]t is axiomatic that the arguments of counsel are not evidence." *Basmas v. Wells Fargo Bank, Nat. Ass'n*, 236 N.C. App. 508, 513, 763 S.E.2d 536, 539 (2014)(citation and quotation marks omitted).

Father argues that *Crews I* left it in the trial court's discretion as to whether to receive additional evidence on remand, so the trial court properly made findings addressing the time period after the evidentiary hearing. But when this Court leaves the matter of receiving additional evidence to the discretion of the trial court, this does not mean that the trial court can make findings of fact regarding something not addressed by the evidence at the hearing. It is equally axiomatic that findings of fact must be based upon competent evidence. *See Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) ("[W]hen the trial court sits without a jury, the standard of review on appeal is *whether there was competent evidence to support the trial court's findings of fact* and whether its conclusions of law were proper in light of such facts." (emphasis added) (citations and quotation marks omitted)). When we leave it in the discretion of the trial court as to whether to receive additional evidence on remand, we mean only that the trial court *may* receive additional evidence on remand if it determines this would be helpful, but the trial court is not *required* to receive additional evidence on remand. *See generally Holland v. Holland*, 169 N.C. App. 564, 572, 610 S.E.2d 231, 237 (2005). ("Additionally, on remand, the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion." (citation and quotation marks omitted)). Since the trial court is aware of the circumstances at the time of remand, and we are not, we often leave this decision to the trial court's discretion because it is in a better position to determine how to proceed.

In other cases, we limit the trial court's discretion to some extent. For example, we recognize the possibility that sometimes counsel for the parties may agree on certain issues after remand so that no additional evidence is needed. We may also allow the parties to determine if they need to present additional evidence. *See, e.g.*, *Lasecki v. Lasecki*, 246 N.C. App. 518, 543, 786 S.E.2d 286, 304 (2016) ("We therefore remand the case to the trial court for further proceedings consistent with this

opinion and direct that if either party requests to present additional evidence for the trial court's consideration on remand as may be needed to address the issues discussed in this opinion, the trial court shall allow presentation of evidence, although the trial court may in its discretion set reasonable limitations on the extent of new evidence presented."). And further, because of the specific issues addressed by the opinion, sometimes we do expressly require additional evidence on remand. *See*, *e.g.*, *Dixon v. Dixon*, 67 N.C. App. 73, 79, 312 S.E.2d 669, 673 (1984) ("We do hold, however, that the nature of child abuse, it being such a terrible fate to befall a child, obligates a trial court to resolve any evidence of it in its findings of fact. This was not done and the order is therefore vacated and the case remanded for a new hearing on the issue of custody.") And in other cases, where the record contains sufficient evidence to support the findings of fact and conclusions of law the trial court must make on remand, the trial court must make the required findings based upon the existing record without taking further evidence. *See*, *e.g.*, *Carpenter v. Carpenter*, 225 N.C. App. 269, 279, 737 S.E.2d 783, 790 (2013) ("On remand, the trial court shall make additional findings of fact based upon the evidence presented at the trial." (footnote omitted)).

But in any case, including this one, if no additional evidence is presented on remand, the trial court can make its findings of fact and conclusions of law only based upon the *existing record*. The order on remand can address only the facts as of the last date of the evidentiary hearing because that is the only evidence in the record. Evidence is always required to support findings of fact, unless the parties have stipulated to the fact or the finding is subject to judicial notice, neither of which is present here.[1] Thus, we cannot review the order to determine if the findings of fact are supported by the evidence because there is no competent evidence for the time period covered by those findings of fact.

We also note this case is unusual, particularly for a non-guideline child support case, because during the September 2014 hearing, the parties presented little evidence regarding their living expenses, minimal

1. "N.C. Gen. Stat. § 8C–1, Rule 201 controls when the court may take judicial notice of adjudicative facts. Rule 201 provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. A fact is considered indisputable if it is so well established as to be a matter of common knowledge. Conversely, a court cannot take judicial notice of a disputed question of fact." *Hensey v. Hennessy*, 201 N.C. App. 56, 68–69, 685 S.E.2d 541, 550 (2009) (citations and quotation marks omitted).

evidence regarding the child's needs and expenses, and they were only allotted thirty minutes each. Upon review of the entire transcript and proceedings on remand, we are concerned that the trial court's misapprehension of the law, as discussed in *Crews I*, *see Crews I*, at *5-6, also caused the trial court to limit the evidence presented at the hearing. The trial court was "mistaken in Finding of Fact number 14 wherein the court cited *Loosvelt v. Brown* as standing for the proposition that the amount of child support awarded could not be in an amount lower than the maximum basic child support obligations." *Id.* at *6 (quotation marks and ellipses omitted). In other words, based upon its misinterpretation of *Loosvelt*, the trial court determined the guideline calculation addressed all of the usual and ordinary living expenses of the child, so evidence was needed only to address any needs above those basic needs deemed extraordinary expenses. At the beginning of the hearing, the trial court stated this limitation on the evidence:

> The Court: -- and I -- I gave, for the parties, I *gave them the minimum standard amount under the law based upon your combined incomes is -- the reasonable needs of the child under the Guidelines will be $2,059. That means that's what the Guidelines will say for a combined income of $25,000. Now, reasonable needs is going to have to be proven beyond that 2,059 for me to consider something more* 'cause I can lean on that very heavily, even the Guidelines say that, so that's going to kind of be the issue I'm going to be looking at, can it be established, you know, more than 2,059, so, each side is going to have 30 minutes, and that includes witnesses, opening, closing. Do either of y'all want to make an opening or you just want to get right to your evidence?

(Emphasis added).

Thus, in the hour of evidence and argument, the parties presented the evidence as the trial court directed, and almost no evidence of the ordinary living expenses and needs of the child. This case did begin as a guideline child support case, since in 2012, both parties had lower incomes. *See id.* at *2. Although now this is a high-income case, the only financial affidavit in our record is the one-page "Child Support Financial Affidavit," which includes only the numbers required to calculate guideline child support: monthly gross income; pre-existing child support payments; responsibility for other children; work-related child care costs; health insurance premium costs for the child; and other "extraordinary

[c]hild-[r]elated expenses."[2] As directed by the trial court at the beginning of the hearing, much of the evidence was about the extraordinary expenses such as Father's travel costs and lessons for soccer, music, and swimming. Accordingly, the misapprehension of law may explain the evidence, and lack thereof, in the record.

In a non-guideline child support case, the trial court must consider the needs of the child, specifically based upon the "accustomed standard of living" of that child, and must make findings of fact to address these needs:

> where the parties' income exceeds the level set by the Guidelines, the trial court's support order, on a case-by-case basis, must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. The determination of a child's needs is largely measured by the accustomed standard of living of the child.

Smith v. Smith, 247 N.C. App. 135, 145–46, 786 S.E.2d 12, 21 (2016) (citations and quotation marks omitted). On remand, based upon the evidence presented at the original hearing and on remand, the new order should include the required findings of fact to address the financial circumstances of both parties and the reasonable needs of the child.

III. Effect of Holding of *Crews I*

And we have one more general concern. Based upon the trial court's comments, the trial court may have been under the impression that because this court vacated and remanded the first order, we approved Father's arguments regarding various findings in the first order, including the amounts of travel costs and medical insurance costs challenged by Mother in this appeal. In other words, this appeal is largely a mirror image of the last appeal on these issues. Father was the appellant from the first order and challenged certain findings, *see Crews I*, *1-7,

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2. The entry for "[p]re-existing [c]hild [s]upport [p]ayments" on this form by Father was likely the reason for the trial court's error in the first order, since Father listed his temporary child support obligation for this child. The pre-existing child support payments as intended on the affidavit would be a child support obligation for *another* child of the parent completing the affidavit. There is no evidence of other child support obligations or other children. In the *Crews I* order, the trial court found that "The Plaintiff should also get half credit for existing child support payments of $898.00 per month, or $450.00 rounded up." But $898.00 was Father's temporary child support obligation, not support for another child.

and Mother was the appellant in *this* appeal and challenged findings on some of those same issues, since the findings are in accord with Father's arguments in the first appeal. But this Court did not address the findings of fact in *Crews I*; we addressed only the legal error. *See id.* at *7. So *if* the trial court made any findings in the order on appeal based upon the belief this Court tacitly approved Father's arguments in *Crews I*, the trial court again made the findings of fact under a misapprehension of the law of the case.

IV. This Appeal

Finally, we have reviewed Mother's arguments in this appeal, and, without addressing each in detail, some have merit, including obvious mathematical errors in the order.

A. Mathematical Errors

The trial court noted in the findings it would allocate half of the cost of Mother's lease and car payment to the child's needs but actually included the entire amount. Also, the trial court found it would allocate the parties' responsibility for the child's needs based upon their percentages of the total income, so 53.41% of the child's support would be allocated to Mother and 46.59% to Father. But the trial court gave Father a "credit" against his percentage of the child's expenses for the full amount of the travel expenses for visitation, which means that Mother bears responsibility for 100% of the travel expense, not her percentage based upon her income. Although we do not endorse the arguments on appeal of either party on the correct calculations of the medical insurance costs and travel expenses, these calculations were issues in both appeals and in the order after remand, the trial court should make its findings and mathematical calculations on these issues clear.

B. Pregnancy and Birth Expenses

Mother brought a counterclaim for the expenses under North Carolina General Statute § 49-15, and Father concedes she presented evidence of these expenses at the trial. The trial court did not address this claim at all, and again even Father concedes the trial court "should have . . . addressed" the issue. On remand, the trial court shall address this claim.

C. Attorney Fees

Mother also sought attorney fees in her answer and counterclaims. The trial court made only two findings regarding her claim for attorney fees:

38. Defendant submitted an Attorney Fee Affidavit which contained billing for this proceeding as well as evidence of counsel fees paid to Attorney Amy Edwards during the prior proceeding in this cause.

39. Since both parties appear to be on fairly equal status as to their abilities to provide for the child, the Court declines to award counsel fees in this matter.

Mother argues that the "trial court erred by failing to make adequate findings of fact and any conclusions of law regarding [Mother's] claim for attorney's fees."

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. *Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding*; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

N.C. Gen. Stat. § 50-13.6 (2011) (emphasis added).

Although the amount of an award of attorney fees is in the trial court's discretion, whether Mother has met the statutory requirements for an award of attorney fees is a question of law. *See Atwell v. Atwell*, 74 N.C. App. 231, 237, 328 S.E.2d 47, 51 (1985) ("While whether the statutory requirements have been met is a question of law, reviewable on appeal, the amount of attorney's fees is within the sound discretion of the trial judge and is only reviewable for an abuse of discretion.") The trial court did not make the required findings of fact to allow us to review the denial of attorney fees, and findings of fact are required to show the basis for either the award or denial of attorney fees:

> Where an award of attorney's fees is prayed for, but denied, the trial court must provide adequate findings

> of fact for this Court to review its decision. Although the trial court denied Ms. Diehl's request for attorneys' fees, it made no findings relating to that denial, such as whether Ms. Diehl acted in good faith or whether she had insufficient means to defray the expense of the suit. Consequently, we must remand for entry of proper factual findings to support the trial court's decision regarding Ms. Diehl's request for attorneys' fees.

Diehl v. Diehl, 177 N.C. App. 642, 653, 630 S.E.2d 25, 32 (2006) (citation and quotation marks omitted).

Under North Carolina General Statute § 50-13.6, the trial court must make findings addressing (1) whether mother is an interested party; (2) whether she was acting in good faith; (3) whether she had insufficient means to defray the expenses of the suit; and (4) whether the party ordered to pay support. Here, Father refused to provide support adequate under the circumstances *existing at the time of institution of the action*. *See* N.C. Gen. Stat. § 50-13.6. The trial court's findings should address each of these four factors. *See Gibson v. Gibson*, 68 N.C. App. 566, 575, 316 S.E.2d 99, 105 (1984) ("Under the principles set forth in *Hudson*, *supra*, however, this action is one for support only and the additional finding requirement of G.S. 50-13.6 is thereby invoked. Our examination of the judgment discloses that the trial court did not find that plaintiff has refused to provide adequate support under the circumstances existing at the time the action was initiated. Such a finding is required in order to award attorney's fees in this case. Its absence compels us to vacate the award of attorney's fees and remand this case for additional findings as required by G.S. 50-13.6. We note incidentally that the expenses on which the award of counsel fees was based appear to relate solely to defendant's child support claim.")

Based upon the evidence, it appears Mother may have met the "statutory requirements of G.S. Sec. 50–13.6" but the trial court made no findings on these factors. *Atwell*, 74 N.C. App. at 237, 328 S.E.2d at 51. Mother presented evidence that at the time of institution of this action, she was still in medical school, receiving public assistance, and had a much lower income. In fact, the initial child support order against Father was entered in a IV action brought on Mother's behalf. Mother testified that she had to borrow money from her brother to pay her attorney fees.

On remand, the trial court may either allow or deny an award of attorney fees in its discretion, but it still must make the findings of fact required for appellate review. *See Diehl*, 177 N.C. App. at 653, 630 S.E.2d

at 32. The trial court must consider whether Mother was "unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit. If the action is for child support alone, there must be an additional finding that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the proceeding." *Belcher v. Averette*, 152 N.C. App. 452, 454-55, 568 S.E.2d 630, 632 (2002) (citations and quotation marks omitted). The trial court made no findings about whether Father had provided "support which is adequate under the circumstances existing at the time of the institution of the proceeding" or Mother's ability to employ counsel to defend against Father in this action. *Id.* On remand, the trial court shall make findings of fact regarding Mother's claim for attorney fees under North Carolina General Statute § 50-13.6, keeping in mind that it *must* consider the circumstances at the time of institution of the action, as to whether Father was providing support adequate *under the circumstances at the time of institution of the proceeding*, and may also consider current circumstances in its discretion. *See generally id.* We express no opinion on whether the trial court should or should not award attorney fees; that decision is in the trial court's discretion. But whatever the decision, the trial court must make the required findings of fact for either a denial of attorney fees or an award of attorney fees.

D. Summary

Based upon the lack of an evidentiary hearing since September 2014, possible misinterpretations of *Crews I*, the mathematical errors, the failure to address all of Mother's claims, and the failure to make necessary findings of fact for Mother's attorney fee claim, we must vacate the order and remand for a new order without addressing the substance of each argument on appeal because as noted by *Crews I*, "[t]he trial court's analysis of th[e] issues may be different when applying the proper legal standard [and considering the new evidence] for a child support award in a high-income case such as this one." *Crews I* at *7.

V. Conclusion

We vacate the order and remand for a new trial on all issues. The parties may rely upon the evidence presented at the September 2014 hearing but may also present additional evidence for the entire time period covered by the hearing, from March 2012, the date the child support claim was filed, to the date of the hearing on remand. We note based upon the arguments on appeal, the trial court should clarify its

calculations of certain expenses. The trial court shall then enter a new order addressing all of the claims and issues.

VACATED and REMANDED.

Judges ZACHARY and MURPHY concur.

STARLA N. FAIRFIELD AND LENNY FAIRFIELD, HUSBAND AND WIFE, PLAINTIFFS
v.
WAKEMED, ALSO DOING BUSINESS AS WAKEMED HEALTH & HOSPITALS; MARSHA M. SMITH, M.D.; BENJAMIN GERMAN, M.D.; CHUDARATNA BHARGAVA, M.D.; AND JOHN & JANE DOE MEDICAL STAFF, DEFENDANTS

No. COA18-295

Filed 2 October 2018

1. Medical Malpractice—pleadings—Rule 9(j)—review of all medical records

Where plaintiffs' Rule 9(j) certification in their medical malpractice complaint stated that their proposed expert witness had reviewed "certain"—instead of "all"—medical records pertaining to the alleged negligence, the trial court properly dismissed the complaint for noncompliance with Rule 9(j).

2. Appeal and Error—abandonment of issues—citation of legal authority

Where plaintiffs argued that the trial court's dismissal of their medical practice complaint pursuant to Rule 9(j) violated their due process rights but they failed to cite any legal authority to support their argument, the Court of Appeals deemed the issue abandoned.

Appeal by plaintiff from order entered 16 November 2017 by Judge W.O. Smith, III in Wake County Superior Court. Heard in the Court of Appeals 5 September 2018.

Michael A. Jones for plaintiffs-appellants.

Cranfill Sumner & Hartzog LLP, by Carl Newman and Katherine Hilkey-Boyatt, for defendants-appellees.

DAVIS, Judge.

In this case, we must once again determine the effect of a litigant's failure to fully comply with the pleading requirements imposed by Rule 9(j) of the North Carolina Rules of Civil Procedure on a complaint alleging medical malpractice. Starla Fairfield and Lenny Fairfield ("Plaintiffs") appeal from the trial court's order dismissing this action based on their noncompliance with Rule 9(j). We affirm.

Factual and Procedural Background

We have summarized the pertinent facts below using Plaintiffs' own statements from their complaint, which we treat as true in reviewing a trial court's order granting a motion to dismiss. *See*, *e.g.*, *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006) ("When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true.").

On 10 May 2014, Starla Fairfield was admitted to WakeMed Health & Hospitals ("WakeMed") in connection with an accidental overdose of acetaminophen. During her treatment, she was given a dose of Mucomyst that was approximately five times greater than the recommended dose. Medical personnel at WakeMed contacted Carolinas Poison Center, and emergency dialysis was ultimately performed on Mrs. Fairfield. Mrs. Fairfield and her husband were informed by medical staff at WakeMed that the staff was "only aware of two other cases of Mucomyst overdose, both resulting in death and severe brain damage, and therefore, that Mrs. Fairfield would also most likely die."

Mrs. Fairfield was subsequently released from WakeMed. As a result of this incident, she continues to experience physical and emotional pain and suffering.

On 13 April 2017, Mrs. Fairfield and her husband filed a complaint in Wake County Superior Court naming as defendants WakeMed; Marsha M. Smith, M.D.; Benjamin German, M.D.; Chudaratna Bhargava, M.D.; and John and Jane Doe Medical Staff.[1] In their complaint, Plaintiffs alleged claims for medical malpractice, negligent infliction of emotional distress, and loss of consortium. All of these claims were alleged to have arisen out of defendants' medical negligence in treating Mrs. Fairfield.

1. Plaintiffs subsequently took a voluntary dismissal of their claims against Dr. Bhargava, Dr. German, and John and Jane Doe Medical Staff. Therefore, WakeMed and Dr. Smith are the only remaining defendants.

The Complaint contained the following provision:

RULE 9(j) CERTIFICATION

> Counsel for the Plaintiffs hereby certify and affirm, that prior to the filing [sic] this lawsuit, pursuant to Rule 9 (j) of the North Carolina Rules of Civil Procedure, that *certain* medical records and the medical care received by Mrs. Fairfield has been reviewed by a physician who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical standard of care provided by Defendants did not comply with the applicable standard of care.

(Emphasis added.)

All of the Defendants filed timely answers and motions to dismiss pursuant to Rule 12(b)(6). On 9 November 2017, a hearing on Defendants' motions was held before the Honorable W.O. Smith, III, in Wake County Superior Court. On 16 November 2017, the trial court entered an order dismissing this action based on its determination that Plaintiffs had failed to comply with Rule 9(j). Plaintiffs filed a timely notice of appeal.

Analysis

I. Rule 9(j)

[1] In this appeal, Plaintiffs contend that the trial court erred in determining that their complaint was not in compliance with Rule 9(j).

> The standard of review of an order granting a Rule 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On appeal, we review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Feltman v. City of Wilson, 238 N.C. App. 246, 251, 767 S.E.2d 615, 619 (2014).

"Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses

some fact that necessarily defeats the plaintiff's claim." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (citation omitted).

A plaintiff's pleading in a medical malpractice action, however, "must meet a higher standard than generally required to survive a motion to dismiss . . . . [T]he requirements of Rule 9(j) must be met in the complaint in order to survive a motion to dismiss." *Alston v. Hueske*, 244 N.C. App. 546, 551-52, 781 S.E.2d 305, 309 (2016). Rule 9(j) states, in pertinent part, as follows:

> (j) *Medical malpractice.* — Any complaint alleging medical malpractice by a health care provider . . . shall be dismissed unless:
>
> > (1) The pleading specifically asserts that the medical care and *all* medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. R. Civ. P. 9(j) (emphasis added).

Our Supreme Court has explained that Rule 9(j) was intended to serve "as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012). Our courts have strictly enforced Rule 9(j)'s "clear and unambiguous" language as requiring dismissal of a medical malpractice action when the plaintiff's pleading is not in compliance with the Rule's requirements. *Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002) (citation and quotation marks omitted). *See id.* ("[M]edical malpractice complaints have a distinct requirement of expert certification with which the plaintiffs must comply. Such complaints will receive strict consideration by the trial judge. Failure to include the certification leads to dismissal.").

Here, the Rule 9(j) certification in Plaintiffs' complaint merely asserted that "certain" of Mrs. Fairfield's medical records had been reviewed by a physician who was expected to provide expert testimony that Defendants' treatment of her fell below the applicable standard of medical care. However, as quoted above, the plain language of Rule 9(j) requires that a plaintiff's pleading in a medical malpractice action

contain an explicit certification that "all" medical records pertaining to the allegedly negligent acts have been reviewed.

We find instructive our Court's decision in *Alston* in which we similarly addressed a litigant's failure to strictly comply with the requirements of Rule 9(j). In *Alston*, the plaintiff brought a medical malpractice action arising from the death of the decedent during a surgical procedure. *Alston*, 244 N.C. App. at 547-48, 781 S.E.2d at 307. In an attempt to comply with Rule 9(j), the complaint alleged the following:

> 29. Prior to commencing this action, the medical records were reviewed and evaluated by a duly Board Certified [sic] who opined that the care rendered to Decedent was below the applicable standard of care.
>
> 30. . . . The medical care referred to in this complaint has been reviewed by person[s] who are reasonably expected to qualify as expert witnesses, or whom the plaintiff will seek to have qualified as expert witnesses under Rule 702 of the Rules of Evidence, and who is willing to testify that the medical care rendered plaintiff by the defendant(s) did not comply with the applicable standard of care.

Id. at 548, 781 S.E.2d at 307.

The trial court granted the defendants' motion to dismiss on the ground that the Rule 9(j) certification was defective. We affirmed the court's order and stated the following in explaining our ruling:

> The wording of the complaint renders compliance with 9(j) problematic. A plaintiff can avoid this result by using the statutory language. Rule 9(j) requires "the medical care and all medical records" be reviewed by a person reasonably expected to qualify as an expert witness and who is willing to testify the applicable standard of care was not met. According to the complaint, the medical care was reviewed by someone reasonably expected to qualify as an expert witness who is willing to testify that defendants did not comply with the applicable standard of care. However, the complaint alleges medical records were reviewed by a "Board Certified" that said the care was below the applicable standard of care. Thus, the complaint does not properly allege the medical records were reviewed by a person *reasonably* expected to qualify as an expert witness.

> This omission in the complaint unnecessarily raises questions about . . . the witness being "reasonably expected" to qualify as an expert under Rule 702. The only information we have is that the witness is "Board Certified." We do not know whether the witness is a certified doctor or nurse, or even another health care professional. We also cannot say whether the "Board Certified" person is of the same or similar specialty as would be required to testify [that] Hueske violated a standard of care. Simply put, we do not have enough information to evaluate whether this witness could reasonably be expected to qualify as an expert in this case.
>
> The legislature passed Rule 9(j) to require a more stringent procedure to file a medical malpractice claim. Although pleadings are generally construed liberally, legislative intent as well as the strict interpretation given to Rule 9(j) by the North Carolina Supreme Court require us to find the wording of this complaint insufficient to meet the high standard of Rule 9(j).

Id. at 552-53, 781 S.E.2d at 310.

Thus, *Alston* demonstrates the degree to which North Carolina courts have strictly enforced the provisions of Rule 9(j). Although the specific reason that Plaintiffs' complaint fails to fully comply with Rule 9(j) in the present case is distinct from that existing in *Alston*, we are nevertheless compelled to reach the same result. Here, Plaintiffs' use of the word "certain" instead of "all" in their complaint with regard to those medical records actually reviewed by their proposed expert witness constitutes a failure to adhere to Rule 9(j)'s specific requirements. Based on the unambiguous language of the Rule, all of the relevant medical records reasonably available to a plaintiff in a medical malpractice action must be reviewed by the plaintiff's anticipated expert witness prior to the filing of the lawsuit, and a certification of compliance with this requirement must be explicitly set out in the complaint.

Allowing a plaintiff's expert witness to selectively review a mere portion of the relevant medical records would run afoul of the General Assembly's clearly expressed mandate that the records be reviewed in their totality. Rule 9(j) simply does not permit a case-by-case approach that is dependent on the discretion of the plaintiff's attorney or her proposed expert witness as to which of the available records falling within the ambit of the Rule are most relevant. Instead, Rule 9(j) requires a

certification that *all* "medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" have been reviewed before suit was filed. *See* N.C. R. Civ. P. 9(j).

The certification here simply did not conform to this requirement. Therefore, the trial court properly ruled that Plaintiffs had failed to comply with Rule 9(j). *See Fintchre v. Duke Univ.*, 241 N.C. App. 232, 242, 773 S.E.2d 318, 325 (2015) (affirming trial court's dismissal of medical malpractice complaint for noncompliance with Rule 9(j)).

II. Due Process

[2] Plaintiffs also contend that the application of Rule 9(j) in this case violates their due process rights. As an initial matter, however, Plaintiffs do not cite any legal authority in support of this argument as required by the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 28(b)(6) ("The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies."). Therefore, we deem this issue to be abandoned.

Plaintiffs' constitutional argument fails substantively as well. Rather than providing an actual explanation as to how Rule 9(j) violates their due process rights, they instead candidly concede that "the argument that the Plaintiff[s] now make is one asking and recommending of [sic] this Court that the law (i.e., language of Rule 9(j)) requires changing in order to do equity and justice."

It is axiomatic that such a request for us to rewrite a statute is antithetical to the proper role of a court in our system of government. As our Supreme Court stated more than fifty years ago:

> When a court, in effect, constitutes itself a superlegislative body, and attempts to rewrite the law according to its predilections and notions of enlightened legislation, it destroys the separation of powers and thereby upsets the delicate system of checks and balances which has heretofore formed the keystone of our constitutional government.

State v. Cobb, 262 N.C. 262, 266, 136 S.E. 674, 677 (1964).

We are not unmindful of the harsh outcomes that can result from the application of Rule 9(j). However, based on the clear language employed by the General Assembly and the prior caselaw from our appellate courts that we are bound to follow, we must interpret Rule 9(j) as it is written.

Any modification of the pleading requirements contained therein must come from the legislative branch rather than the judicial branch. *See In re J.M.D.*, 210 N.C. App. 420, 427, 708 S.E.2d 167, 172 (2011) ("[N]either we nor the trial court can re-write the statute which the General Assembly has given us.").

Conclusion

For the reasons stated above, we affirm the trial court's 16 November 2017 order.

AFFIRMED.

Judges ELMORE and DILLON concur.

AMY S. GRISSOM, PLAINTIFF
v.
DAVID I. COHEN, DEFENDANT

No. COA18-66

Filed 2 October 2018

1. Contempt—civil—show cause order—burden of proof

In a contentious custody and visitation case in which a mother sought to hold a father in civil contempt because their teenage daughter was not returned to her physical custody, the trial court's order finding the father not to be in contempt did not contain a misapprehension that the mother carried the burden of proof. Although the order included a conclusion of law confusingly referring to the mother as not having met "her burden," the hearing transcript demonstrated the trial court's understanding of the differences between civil and criminal contempt and the differences in the burden of proof between a motion for contempt and a show cause order.

2. Child Visitation—civil contempt—custody order interpretation—implied forced visitation

In a contentious custody and visitation case in which a mother sought to hold a father in civil contempt because their teenage daughter was not returned to her physical custody, the Court of Appeals rejected the mother's argument that the trial court should have found the father in contempt for failing to force the daughter to adhere to the custody order's visitation schedule. Precedent did not

establish a "forced visitation" rule, implied or otherwise. The trial court properly considered the best interests of the teenage daughter, who suffered from depression and self-harm and who expressed her preference not to visit with her mother, and the circumstances at the time of the hearing, before determining that the father was not in willful contempt.

3. Child Visitation—civil contempt—visitation provisions—willfulness

In a contentious custody and visitation case in which a mother sought to hold a father in civil contempt because their teenage daughter was not returned to her physical custody, the trial court did not misapprehend the law regarding custody and visitation when it found the father was not in willful contempt for failure to force his daughter to visit or return to her mother. The only way a trial court can enter a "forced visitation" order is under compelling circumstances, after giving the parties notice and an opportunity to be heard, and entering an order with findings and conclusions that take into account the best interests of the child; it would be a rare case in which physically forcing a child to visit or stay with a parent would be in that child's best interests.

Appeal by plaintiff from order entered 9 October 2017 by Judge Matthew J. Osman in District Court, Mecklenburg County. Heard in the Court of Appeals 4 June 2018.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and Jonathan D. Feit, for plaintiff-appellant.

Womble Bond Dickinson LLP, by H. Stephen Robinson; Kevin L. Miller; and Tom Bush, for defendant-appellee.

STROUD, Judge.

Plaintiff Amy S. Grissom ("Mother") appeals from the trial court's order holding that defendant David I. Cohen ("Father") is not in civil contempt of a prior custody order based upon the refusal of the parties' daughter, Mary,[1] to return to the physical custody of Mother. The trial court first entered an order denying Mother's motion for contempt on 17 August 2016, but this order did not include findings of fact necessary to permit review by this Court, so we vacated that order and remanded

1. We use pseudonyms to protect the identity of the parties' children.

for the trial court to enter a new order including findings of fact to support its conclusion. We affirm.

I. Background

This appeal arises from an exceptionally contentious and prolonged custody battle between Mother and Father, beginning in January 2007 and continuing, with a few lulls, ever since. The parties are the parents of two children; the oldest, their son John, had just turned 18 before Mother filed her contempt motion, and the contempt motion and order in this appeal applies only to their daughter, Mary, now age 17. We will not recount the details of this battle leading up to the order on appeal, but in brief summary, the first custody order entered in 2009 granted sole legal and primary physical custody to Mother and secondary custodial time to Father.[2] Father's decision-making authority regarding the children was severely curtailed by this order based upon Father's misdeeds as described in the order. There were some relatively minor legal skirmishes after the 2009 order, with no major changes to the custodial arrangement until 9 March 2015, when the trial court entered an order modifying the 2009 custody order ("2015 Modified Custody Order"). Generally, the 2015 Modified Custody Order found that Father's behavior and relationship with the children had improved and the children wanted to spend more time with him. The 2015 Modified Custody Order allowed Father to have greater visitation time with the two children.

On 10 June 2016, Mother filed a motion she calls an "Omnibus Motion," comprising a motion for civil and criminal contempt, a motion for a temporary restraining order ("TRO") and preliminary injunction, and a motion for "judicial assistance." The Omnibus Motion is single-spaced and 17 pages long. Five and a half pages summarize the procedural history, including quotes from portions of prior orders, with particular emphasis on any findings unflattering to Father. The substantive portion of the Omnibus Motion begins at the bottom of page 5 and is entitled "Withholding of Plaintiff/Mother's Physical Custodial Time and Alienation." Mother then makes four pages of allegations, some "upon information and belief," of Father's actions and statements she alleges are part of his "campaign to alienate the children from Plaintiff/Mother," which has "intensified after the Court's most recent Custody Order and

2. Mother's counsel described the history in his closing argument, stating that he first wanted to "remind the Court . . . that [Father] has created nine years of litigation, has filed three motions to modify custody, has participated in two three-week custody trials, has involved the children with subpoenas, affidavits, live testimony last time and this time. There have been four judges, 636 findings of fact in two custody orders." And now, we can add two appeals to this tally.

has resulted in the children being severely alienated from Plaintiff/Mother."[3] She stresses her belief that Father has encouraged the children not to return to her and that he has not "caused the children to face any consequences for their failure" to return to her home. She alleged that in January 2016, she received an email from John, which was copied to Father; Dr. Shulstad, the children's pediatrician; Samantha Bosco, the guidance counselor at Mary's high school, and Janani Buford, the guidance counselor at Mary's middle school. John said Mary had confided to him a few days before that she was self-harming by cutting herself, and she had been doing this for about a year. He believed that she "needed serious help" and needed "to be in as positive of an environment as possible." John also stated:

> After almost ten years of moving back and forth constantly, and my 18th birthday coming quickly, I feel that I am mature and reasonable enough to make my own decisions. I have spoken with [Mary] and I feel that it is best if we spent time solely with Dad. [Mary] and I both love you very much. I would still like to see you and sustain a good relationship with you, but this current situation is just too difficult for me and [Mary] to cope with. I hope that you will understand and respect our decision just as we have understood and respected yours for almost a decade.

John claimed Mary asked Mother if she could see a therapist but her Mother ignored her; Mother denied that Mary ever requested to see a therapist. At the time of this email, the children had been with Father since 28 December 2015 for holiday visitation and they did not return to Mother's home afterwards except for some brief visits; they did not stay overnight. Mother alleged this email was another example of Father's campaign to destroy her relationship with the children. She alleged that Father was encouraging the children not to return to Mother's home and that he gave them no consequences for their refusal. She alleged that despite the children's refusal to return to her home, he "rewards" Mary by continuing to allow her to have sleepovers with friends, buy clothing, keep her phone, and take vacations. She alleged that the children were "hostile" and "cruel" to her, just as Father has been.

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3. John had attained the age of 18 years old two months before Mother filed the Omnibus Motion, but he was still a minor as of January 2016 and at the time of most of the events described in the motion. Thus, when we refer to the "children," we are referring to both John and Mary, but we realize that John was an adult when the Omnibus Motion was filed and he was no longer subject to the 2015 Modified Custody Order at that time.

The next section of the motion is entitled "Refusal to Support [Mary's] Attendance in Therapy, Failure to Apprise Plaintiff/Mother of [Mary's] Condition, And Attempt to Obtain [Mary's] Therapeutic Records." Mother describes her efforts to find a therapist for Mary after receiving the email from John and Mary's opposition to seeing the therapist she selected, alleging that Mary's reluctance was caused by Father's "influencing [Mary] to further his own goals." Mary did ultimately see the therapist Mother selected, Ms. Reed, although she "continues to be reluctant." She alleged that on 2 February 2016, Mary "refused to leave school to attend an appointment with Ms. Reed," and Mother took her to see Dr. Shulstad, who discovered eight or nine "fresh cuts on [Mary's] leg." She notes this cutting occurred while Mary was with Father. Dr. Shulstad encouraged Mary to see Ms. Reed, and although she refused at times, she attended some appointments "when forced to do so by Dr. Shulstad or when she wants something (such as medical authorization to attend a summer camp)."

The next section of the motion is entitled "Interfering with Educational Decisions" and includes about a page of allegations of the parties' disputes regarding Father taking Mary to tour boarding schools during the previous summer. The following section is entitled "Motion for Contempt." It has five paragraphs, alleging his willful violation of the order and requesting that Father be held in civil and criminal contempt.

The next section of the motion is entitled, "Motion for Temporary Restraining Order and Preliminary Injunction." Mother requested that the court enter a Temporary Restraining Order and Preliminary Injunction enjoining Father "from interfering with" Mother's custodial rights and "authority to made medical and mental health decisions" for Mary; from taking Mary to "tour any additional schools" or talking to her or assisting her in any way regarding her application or attendance at any school; and from showing "these Motions and any subsequent Orders to the parties' children" or talking about them. She also asked that Father be required to "return [Mary] to" her physical custody and "to support [Mary's] attendance at reunification therapy and counseling with the therapist" of Mother's choice.

The last section of the motion is entitled "Motion for Judicial Assistance" and Mother moved for the court to "facilitate intensive reunification therapy."

The prayer for relief is two pages long. In pertinent part, Mother requested issuance of a show cause order directing that a hearing be held and that Father "show cause as to why he should not be held in

contempt of the March 2015 Custody Order." She also requested that the court

> 3. Find Defendant/Father in civil contempt of court and punish him as set forth in N.C.G.S. § 5A-21 et seq. until he can demonstrate a willingness to comply with the Court's March 2015 Custody Order.
>
> 4. Find Defendant/Father in criminal contempt of court and punish him as set forth in N.C.G.S. § 5A-12 as a result of his willful failure to comply with the provisions of the March 2015 Custody Order.

Mother specifically asked for a list of "mechanisms" to enforce the Order and "as purging conditions" of contempt. This list includes several continuing actions, including that he "exert his parental authority and control": to ensure that [Mary] returns to" her custody and stays there; to ensure that Mary attends counseling, to ensure that Mary attends reunification therapy; and to ensure that Mary communicates with Mother while in Father's care. Mother also asked that Father be required to permit Mother to "make up the custodial parenting time missed since January 4, 2016."

On 13 June 2016, Mother filed and served Father with a Notice of Hearing for 28 June 2016 on "Plaintiff/Mother's Motion for Contempt filed June 10, 2016." On 14 June 2016, the trial court entered an Order to Show Cause requiring Father to appear and show cause why he should not be held in civil or criminal contempt. Father requested continuance of the hearing to allow more time to prepare, but his motion was denied, and the trial court held a hearing on the contempt motion and order to show cause on 28 June 2016.

As this Court noted in the prior appeal, "At the 28 June 2016 show cause hearing, the trial court did not allow Mother to proceed on *both* civil *and* criminal contempt, requiring Mother to choose to pursue either civil *or* criminal contempt. Accordingly, Mother chose to proceed on her civil contempt motion against Father." *Grissom v. Cohen*, __ N.C. App. __, 803 S.E.2d 697, at *2 (2017) (unpublished) ("*Grissom I*"). The trial court entered its first order finding Father not to be in civil contempt which was reversed by the first appeal and remanded for findings of fact:

> The trial court's order, though, is devoid of any specific factual findings regarding Father's actions concerning the issue of Father's willfulness. In order for us to conduct any meaningful review of the trial court's determination

> regarding Father's willfulness, we must know what facts the trial court found to make that ultimate finding. Therefore, we remand the matter and direct the trial court to enter specific factual findings regarding whether Father's actions were willful. For instance, if the trial court enters findings that Father did not force or encourage his children to stay with him during Mother's time with the children, such findings would support the trial court's ultimate finding that Father did not act willfully, and the trial court would not be required to hear any additional evidence on the matter.

Grissom I, __ N.C. App. __, 803 S.E.2d 697, at *5 (citation omitted).

On 9 October 2017, the trial court entered a new order ("Order on Remand") with detailed findings of fact and conclusions of law[4] without receiving additional evidence. Mother timely appealed.

II. Analysis

Mother argues the trial court "erred by failing to hold Father in civil contempt for effectively eliminating Mother's primary custody of their daughter." She claims to challenge 22 of the 37 findings of fact in the order and 7 of the legal conclusions. Although she argues she is challenging the findings of fact, she does not argue that the findings are not supported by the evidence. Instead, she contends the trial court's findings are in error because it (1) "misallocated the burden of proof;" (2) "Misapprehended the express and implied requirements of the Modified Custody Order," specifically arguing that the order is a "forced visitation" order;" and (3) erred by determining that "Father committed no *willful* violation of the modified custody order" based upon the trial court's misunderstanding of "willfulness" in this context. She makes the bold and legally impossible request that *this* Court make the factual determination that "Father willfully violated the Modified Custody Order" and to "remand . . . for a new fact-finder to consider additional evidence regarding whether Father remains in civil contempt." We cannot do this, since it is the trial court, not our Court, which is "entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, [and] find the facts[.]" *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 620 (2015). Mother requests in the alternative that we "remand for a new fact-finder to conduct a new contempt hearing with detailed instructions

4. The trial court has entered orders addressing the other motions in the Omnibus Motion and those orders are not the subject of this appeal.

indicating that [*Hancock v. Hancock*, 122 N.C. App. 518, 471 S.E.2d 415 (1996)] and its progeny do not control."[5]

This Court does not conduct wholesale *de novo* review of contempt orders, as Mother seems to request. Instead, "[t]he standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997). "However, findings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal. The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*." *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 142-43 (2009) (citations, quotation marks, and brackets omitted). Since Mother has challenged none of the findings of fact as unsupported by the evidence, but argues only that the trial court "misapprehended" the law, we will review *de novo* the trial court's "apprehension of the law" to determine if the trial court considered the issues under the correct legal standards. *See generally id.* If the trial court considered the issues based upon the correct law, we will review the legal conclusions to determine if they are supported by the findings of fact. *Id.*

The trial court may find a party in civil contempt for failure to follow a court order under N.C. Gen. Stat. § 5A-21, which provides :

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a)The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2017).

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5. Mother has not suggested any impropriety by the trial court and we cannot discern any conceivable legal basis for her request for a "new fact-finder." Mother asks for remand and she asks not only for another bite at the apple -- she wants a new apple also.

A. Burden of Proof

[1] Mother first argues the trial court improperly placed the burden of proof of civil contempt on her and not on Father. She notes correctly that "A show cause order in a *civil* contempt proceeding which is based on a sworn affidavit and a finding of probable cause by a judicial official *shifts the burden of proof* to the defendant to show why he should not be held in contempt." *State v. Coleman*, 188 N.C. App. 144, 149-50, 655 S.E.2d 450, 453 (2008). The trial court entered the 14 June 2016 Show Cause Order based on Mother's Omnibus Motion, so Father had the burden to show why he should not be held in contempt under the show cause order. *Id.* But Mother had also filed and served a separate notice of hearing on 13 June 2016 on the motion for contempt; on that motion and notice of hearing, the burden of proof was on her. *See* N.C. Gen. Stat. § 5A-23(a1) ("The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party.").

Mother argues that the trial court improperly placed the burden on her based upon the following conclusion of law in Order on Remand: "5. As a matter of law, Mother failed to prove by a preponderance of the evidence that Father was in violation of the Modified Custody Order; nor has Mother met *her burden* of proving that Father is in civil contempt." (Emphasis added). The Order on Remand also included several other conclusions of law that Father was not in willful contempt. Three were included in the section of the order entitled "Conclusions of Law:"

> 3. As a matter of law, Father has not willfully violated the Order with his actions such that he is in civil contempt, as alleged by Mother.
>
> . . .
>
> 7. Father is not in civil contempt of Court.
>
> 8. Mother's motion for Contempt should be denied.

At least two others were included within the Findings of Fact:

> 35. Father is not in civil contempt.
>
> 36. Mother's motion for civil contempt should be denied.

Mother also argues that it would be "problematic to simply reverse based on the burden-misallocation and remand for an unguided reconsideration," because of Mary's "fast-approaching eighteenth birthday." She therefore requests *this Court* to make new factual determinations based upon the allegations in her verified motion -- which we cannot do, and would not do if we could -- or that we remand for a complete do-over

with a different judge. Even if there was any legal basis for a complete do-over -- and there is not -- remand for an entirely new trial would be unlikely to accomplish Mother's purpose of having a new order before Mary turns 18. We appreciate her urgency to have the assistance of the courts in reestablishing her relationship with Mary, but we must review the order on appeal in compliance with the correct standards of review.[6] *See generally Sharpe*, 127 N.C. App. at 709, 493 S.E.2d at 291; *Tucker*, 197 N.C. App. at 594, 679 S.E.2d at 142-43 (2009).

We agree the trial court's various conclusions of law are confusing, and the trial court probably should not have used the words "her burden" in the order. Taken out of context, these words create Mother's argument that the trial court "misapprehended" the law and placed the burden on her. *See Tigani v. Tigani*, __ N.C. App. __, __, 805 S.E.2d 546, 549-50 (2017) ("N.C. Gen. Stat. § 5A-23(a) (2015) provides that a proceeding for civil contempt may be initiated by the order of a judicial official directing the alleged contemnor to appear and show cause why he should not be held in civil contempt, or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears and shows cause why he should not be held in contempt. Under either of these circumstances, the alleged contemnor has the burden of proof. In addition, pursuant to N.C. Gen. Stat. § 5A-23(a1), proceedings for civil contempt may be initiated by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party. When an aggrieved party rather than a judicial official initiates a proceeding for civil contempt, the burden of proof is on the aggrieved party, N.C. Gen. Stat. § 5A-23(a1) (2015), because there has not been a judicial finding of probable cause." (Citations, quotation marks, brackets, and ellipses omitted)).

Father argues that the trial court's confusing order is the result of Mother's complex motions. In her Omnibus Motion she asked to proceed on *both* civil and criminal contempt simultaneously, and to proceed on *both* the motion for contempt (for which she would have the burden of proof) and the show cause order for contempt (for which Father would have the burden of proof). He contends that since this Court had already

6. The trial court agreed, and we agree that *everyone* should be complying with the existing 2015 Modified Custody order, but the reality is this: as of 27 May 2019, Mother and Mary will have to deal with their relationship on their own terms. We sincerely hope they will be successful, and sooner rather than later.

remanded for a detailed order, the trial court was simply trying to cover all the bases. Father may be right that the trial court was simply trying to address both the contempt motion and the Show Cause Order with its multiple conclusions of law that Father was not in willful contempt.[7] But upon reviewing the various motions, hearing transcript, this Court's prior opinion, and the entire order in context, we simply cannot agree that the trial court misallocated the burden of proof.

At the beginning of the hearing, the trial court and counsel discussed which portions of the Omnibus Motion were to be heard that day. Before any evidence was presented, the trial court asked Mother's counsel:

> Judge: Well, you get to choose whether you want to proceed first or whether you want the burden to shift, right, on the motion to show cause?
>
> [Mother's counsel]: I do want the burden to shift. My sole question is about time and some equal allocation of the time.

The trial court then asked counsel how many witnesses each anticipated calling to assist in allocation of the time for the hearing. Father's counsel said he would call four or five witnesses; Mother's counsel said she would call "zero to one" but noted that he would need adequate time for cross-examination and argument. The trial court then allocated time for the case, and Father presented his evidence *first*, because he had the burden of proof. During the testimony of the witnesses, there were many objections from counsel and the trial court tried to keep the questioning focused on the issue being heard since the issue was civil contempt, not criminal. At one point during cross-examination of Father by Mother's counsel, regarding the dispute over Father's taking Mary to visit boarding schools in 2015, the trial court noted this would be a past violation and not something for which Father may be held in civil contempt for as of that hearing in 2016. The trial court noted:

> JUDGE OSMAN: I mean, as it relates to -- well, I mean, I don't know. I just did a CLE on this, I planned a CLE on this. I kind of feel like I know what I'm talking about. But sure, go ahead.

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7. Despite its length, this opinion does not fully reflect the procedural or factual complexities of this case. After all, Mother calls her motion an "Omnibus Motion", and this name is accurate; Omnibus means, according to Black's Law Dictionary, "In all things; on all points." *In omnibus*, Black's Law Dictionary (10th Ed. 2014).

At these points and others during the hearing, the trial court demonstrated that it understood the differences between civil and criminal contempt and understood the differences in the burden of proof between a motion for contempt and a show cause order. We are satisfied that the trial court understood that the burden of proof was on Father to show cause on why he should not be held in contempt and that the reference in the order to "her burden" was in response to Mother's motion for contempt, as opposed to the show cause order.

Even if we remanded for the trial court to rephrase its order and remove the words at issue, ultimately, nothing would change. Father met his burden to show cause as to why he should not be held in contempt. He testified, and he presented compelling evidence including testimony from John, Mary, Dr. Shulstad, Ms. Buford, and various documentary exhibits. A remand would simply delay final resolution of the contempt motion and prolong litigation in this matter until after Mary turns 18.

Mother did not testify or present any testimony from any other witnesses, electing to rest on her verified motion alone.[8] Over Father's objection, the trial court agreed to accept her verified motion as equivalent to testimony presented at trial. We express no opinion on whether the trial court should have accepted the motion in this manner, but the mere fact that she filed a verified motion does not make her allegations irrefutable, any more than her live testimony would be irrefutable. The trial court has the discretion to determine the credibility and weight of all the evidence, whether it was a written document or live testimony, and this Court cannot re-weigh the evidence. *See*, *e.g.*, *Clark v. Dyer*, 236 N.C. App. 9, 27-28, 762 S.E.2d 838, 848 (2014) ("[I]t is within a trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial. We will not reweigh the evidence presented to the trial court[.]" (Citation and quotation marks omitted)). Father refuted the motion, and Mother had full opportunity to *respond* to his presentation of evidence, but chose not to do so and to rely only on her written motion. In other words, Father met *his burden* to produce evidence in response to the Show Cause Order to show why he should not be held in willful contempt with competent evidence which the trial court determined was credible. The burden then shifted back to Mother to refute his evidence, but she elected not to present any evidence. In that sense, she did not carry "her burden,"

8. The trial court demonstrated its understanding of the burden of proof at this point in the hearing as well. When the trial court asked if Mother would call any witnesses, her counsel stated, "I don't have a witness." The trial court responded, "Nor are you required to do so with a show cause."

either to show contempt under her motion for contempt or to respond to Father's evidence presented based upon the show cause order.

Mother also argues that the trial court's "misapprehension" of the burden of proof caused the findings of fact to be improper, since the court was considering the evidence under the wrong law. Even if the trial court had "misapprehended" the burden of proof, Mother has not explained how this "misapprehension" would have had any effect on the findings of fact. The findings are all supported by the evidence and most of the facts are not really in dispute. For example, Mother challenges this finding of fact:

> 16. [Mary] revealed to her brother that she had been self-harming for approximately one year and that she felt depressed and particularly so when at her Mother's home.

But Mother's own Omnibus Motion included detailed allegations of these same facts about Mary's revelation to John. There was no real dispute regarding most of the basic facts relevant to contempt, such as when Mary stopped going to her Mother's house, her stated reasons for stopping, or that she was depressed and self-harming. Mother's motion is based only on *why* Mary remained at her Father's home. She claims Mary stayed because of Father's continuing intense efforts to alienate Mary and his refusal to force her to return to Mother's home; Father claims Mary refused to go and he tried but was unable to make her go by any reasonable means short of physical force or punishment that may exacerbate her depression and self-harming. The trial court's findings resolved these factual issues, and based upon the evidence, we cannot discern how a "misapprehension" of the burden of proof would have made any meaningful difference in the findings of fact. This argument is without merit.

B. "Implied" Forced visitation provisions

[2] Mother next argues that the trial court "misapprehended the express and implied requirements of the modified custody order." She notes that the Order on Remand states that the 2015 Modified Custody Order has no "directive" requiring either party to "force visitation with the other parent." She challenges these findings of fact, which she notes are actually mixed findings of fact and conclusions of law:

> 26. It is very clear that both children do not want to see their Mother, and there is no directive in the Order imposing any duty on either parent to force visitation with the other parent.

. . . .

> 33. Father is not in willful violation of the Modified Custody Order, and any noncompliance by Father, the person to whom the order is directed, is not willful. To the extent the visitation schedule is not being honored, the Court finds that this is the consequence of [Mary's] refusal to return and not due to any ongoing conduct by Father to thwart, prevent or inhibit [Mary's] return to Mother's residence.[9]

Mother contends that the 2015 Modified Custody Order does have "implied" forced visitation requirements. The 2015 Modified Custody Order is long and very detailed, but in summary, the order sets out detailed provisions on custodial times for each parent including holidays and school breaks and detailed provisions on decision-making. It also includes the provision that "[t]his order is enforceable by the contempt powers of the Court."

Mother relies heavily on *Reynolds v. Reynolds*, 109 N.C. App. 110, 426 S.E.2d 102 (1993), for her argument that the 2015 Modified Custody Order is a "forced visitation" order. *See id.* at 113, 426 S.E.2d at 104. Yet *Reynolds* was not a contempt case; it was a constitutional challenge to a visitation order. *Id.* at 112, 426 S.E.2d at 104. In *Reynolds*, the mother and father originally had an order of joint custody without a specified visitation schedule. *Id.* at 111, 426 S.E.2d at 103. The parties could not agree on visitation, so the father filed a motion for visitation. *Id.* The daughter, then age 11, "expressed a desire not to visit her father[,]" but the trial court determined it was in her best interest to visit with him and entered an order setting a visitation schedule. *Id.* at 113, 426 S.E.2d at 104. There is no indication in the opinion that the daughter had any serious emotional or behavioral problems -- such as self-harming -- but she simply did not want to visit her father. *See generally id.* The order in *Reynolds* included a provision "that '[v]iolation of this Order shall be punishable by Contempt.' " *Id.*, 426 S.E.2d at 105. Both the mother and the daughter challenged the order as a violation of their constitutional due process rights. *See generally id.* at 112, 426 S.E.2d at 104 ("The plaintiffs' sole contention on appeal is that the Order for visitation violates

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9. Although she fortunately did not request this relief before the trial court, Mother implies quite strongly that the trial court could even hold *Mary* in contempt for not returning to her physical custody. She notes that "the court here incorrectly omitted Daughter as a person (1) to whom the Modified Custody Order is directed; and (2) over whom it possesses jurisdiction."

the Constitutional rights of the minor plaintiff."). This Court found "no merit to the arguments presented in the plaintiffs' brief" and affirmed the order. *Id.*

Mother's argument regarding "forced visitation" based on *Reynolds* relies upon this Court's comparison of the *Reynolds* order to an order in *Mintz v. Mintz*, 64 N.C. App. 338, 307 S.E.2d 391 (1983). *See Reynolds*, 109 N.C. App. at 112-13, 426 S.E.2d at 104. As explained in *Reynolds*, the *Mintz* order

> set out a specific visitation schedule which the minor son of the parties simply decided he did not want to follow. The plaintiff mother, who had primary custody of the child, did not insist that the child comply with the Order. *Unlike the Order in the present case, the Order in Mintz provided that, upon noncompliance with the Order, the father was to take the Order to the sheriff's office and the sheriff was to immediately arrest the mother for contempt and place the son in the custody of the father.* This Court found that such a provision denied the mother due process of law, and therefore held the visitation Order to be invalid. This Court further concluded that, although the facts in *Mintz* failed to support a valid Order, an Order of "forced visitation" could be entered once the trial judge has (1) afforded the parties an opportunity for a hearing in accordance with due process, (2) created an Order setting out specific findings of fact and conclusions of law to justify and support the Order, and (3) made findings that include at a minimum that the drastic action of incarceration of a parent is reasonably necessary for the promotion and protection of the best interest and welfare of the child.

Reynolds, 109 N.C. App. at 113, 426 S.E.2d at 104 (citations omitted) (emphasis added).

The *Reynolds* Court concluded that the order did not violate the plaintiffs' due process rights, since it was "not analogous to the contempt provision in the *Mintz* case as it does not provide that the violator will be incarcerated upon the oral report of a violation to the sheriff. Rather, the provision is a valid declaration that one who violates the Order will be subject to contempt proceedings in accordance with due process." *Reynolds*, 109 N.C. App. at 113, 426 S.E.2d at 105. The holding of *Reynolds* is simply that custody or visitation provisions do not violate the constitutional due process rights of either the parents or the child

because they are enforceable by contempt proceedings as long as the alleged condemner has proper notice and opportunity for hearing. *See generally id*. *Reynold*s does not establish any sort of "forced visitation" rule. *Id*.

Nor does the *Mintz* case create a "forced visitation" rule as Mother claims. *See generally* 64 N.C. App. 338, 307 S.E.2d 391. In fact, *Mintz* uses the word "forced" only once, in the first sentence, as a description of what happened in the case: "This case concerns a domestic confrontation between mother and father over forced visitation of their 11-year-old child with the father." *Id*. at 338, 307 S.E.2d at 392.[10] As noted in *Reynolds*, the *Mintz* order was defective because it allowed immediate incarceration of the alleged contemnor based on the word of the other parent, without opportunity for prior notice and hearing. *Reynolds*, 109 N.C. App. at 113, 426 S.E.2d at 104. *Mintz* does not address any sort of "implied" provisions of forced visitation. *See generally Mintz*, 64 N.C. App. 338, 307 S.E.2d 391.

Mother argues that because the 2015 Modified Custody Order has a provision that "[t]his order is enforceable by the contempt powers of the Court," it is a "forced visitation" order. Father responds that this provision is unnecessary, since *all* custody and visitation orders are enforceable by the contempt powers of the court anyway. Many orders include this provision simply as a reminder to the parties of the potential consequences of violation, but its absence does not mean the order cannot be enforced by contempt under N.C. Gen. Stat. § 5A-11 (2017) ("Criminal contempt") or N.C. Gen. Stat. § 5A-21 ("Civil contempt"). But Mother argues this provision creates a "forced visitation" order with "express and implied" requirements. Apparently, the "express" requirements are the custodial schedule, and the "implied" requirements are the actions a party must take to "force" visitation or custodial time in accord with the order. She argues that

> to avoid contempt, Father must do exceedingly more than meet the *de minimis* threshold the court seemingly (and incorrectly) created here -- that is, he cannot forestall a "willful noncompliance" determination merely by foregoing blatant force, manipulation, punishment, marginalization, persuasion, or mandates to thwart Daughter's court-ordered "best interests" relationship with Mother.

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10. *Mintz* does use the verb "force" three times, but these are as part of the facts and description of the issues. For example, the mother claimed "she felt she could not force David to go with his dad." *Id*. at 338-39, 307 S.E.2d at 392 (quotation marks omitted).

This awkward sentence seems to be based in part upon the trial court's finding No. 27:

> 27. The Court finds that Father did not create any situation to manipulate, or otherwise punish, or marginalize Mother's parenting time, nor did Father attempt to persuade or mandate in any fashion that [Mary] and [John] should not spend time with Mother as set forth in the Modified Custody Order."

But the trial court's finding was simply addressing Mother's own allegations in her Omnibus Motion that Father had intentionally done these very things in the past to alienate the children from her and was continuing to do them still. For example, her Omnibus Motion makes detailed allegations about times when Father had in the past "physically blocked" the children from seeing Mother; used his religion to divide the children from her; "used his 'money, power, and high energy to influence professionals to advance his agenda with respect to' " the children; "manipulated the professionals involved in the care of his children;" empowered the children to make Mother appear to be the "the bad guy," and many other similar allegations. The trial court found that Father had *not* committed this misbehavior as alleged by Mother's Omnibus Motion. This finding does not mean that the trial court misunderstood Father's obligation to take any reasonable measures possible to make Mary return to her Mother's home. Instead, the trial court found that "Father has taken reasonable measures to comply with the order as detailed in Findings of Fact 20, 21, and 22.[11] However, any noncompliance with the Modified Custody Order is, again, due to [Mary's] refusal to comply and not due to or caused by any noncompliance with the order by Father."

In every custody case, even contempt cases, the "polar star" is the best interest of the children; the *Mintz* case makes this point:

> In all custody or visitation cases the child's best interest is the polar star. Here, the order fails to contain any findings

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11. Those findings state that Father encouraged Mary to return; he drove Mary by her Mother's house and encouraged her to get out and visit Mother; he invited Mother to come to his home to talk to Mary. Although the trial court did not specifically find how many times these things happened, these are ultimate findings of fact. *See, e.g.*, *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) ("The trial court may not simply recite allegations, but must through processes of logical reasoning from the evidentiary facts find the ultimate facts essential to support the conclusions of law." (Citation and quotation marks omitted)). The trial court need not recite all of the evidence, but the evidence showed Father encouraged Mary to return and drove her to her Mother's home almost daily except during times when they were out of town.

> that the best interests and welfare of the child would be served by jailing the mother if the child refuses to visit with his father. This failing in the order also contributes to its invalidity.

Mintz, 64 N.C. App. at 340, 307 S.E.2d at 393 (citations omitted). The *Mintz* Court also notes that for older children, the trial court may give more weight to the wishes of the child:

> If the child is of the age of discretion, the child's preference on visitation may be considered, but his choice is not absolute or controlling. As to what age is the age of discretion, we feel that the better statement of the law is that found in 42 Am. Jur. 2d *Infants* § 45 (1969): The nearer the child approaches the age of 14, the greater is the weight which should be given to the child's custodial preference. As to when the child is mature and intelligent enough to formulate a rational judgment concerning its welfare, it is generally agreed that in the absence of a statute to the contrary, no specific age is set by law in this regard, but the question depends on the mental capacity, or the mental development, or the intelligence of each child in question. It remains the duty of the trial judge to determine the weight to be accorded the child's preference, to find and conclude what is in the best interest of the child, and to decide what promotes the welfare of the child.

Id. at 340-41, 307 S.E.2d at 393-94 (citations omitted).

Mary was 15 years old at the time of the hearing, and the evidence showed that she is a very intelligent, mature, and capable young woman. The trial court heard Mary's testimony and testimony from her long-time pediatrician and her school guidance counselors. The trial court had the duty to consider the weight to give to her preference and to consider her best interests; the transcript and order show the trial court took this duty seriously. Although this is a contempt case and not a case establishing custody, the trial court was considering Mary's best interests as part of its evaluation of what Father should do to make Mary visit her Mother. There is no dispute that she was depressed and self-harming.[12]

12. Mother actually took the position at the hearing that Mary's self-harming was "irrelevant" to whether Father was in contempt. In a colloquy regarding one of the many objections during John's testimony, her counsel stated: "We'll stipulate there was cutting going on. I question what the relevance is of all of this in determining whether or not [Father] has wilfully violated the Court's order by not allowing [Mother] the right to exercise her custody time. There is no relevance."

Dr. Shulstad testified that he had insisted that Mary go to therapy, and if she had not, he would have considered inpatient treatment for her protection.[13] The evidence showed, and the trial court determined, that Mary's older brother, John, was the one whom she confided in and he sought help for her. And Mary and John then refused to return to their Mother's home. Mary testified that she was more depressed and anxious at her Mother's home and she did not feel she was ready to return. The trial court determined that Father did all that he could reasonably do to get Mary to visit her mother without resorting to actions that would likely be harmful to her. Mother cites to *Hancock v. Hancock*, 122 N.C. App. 518, 471 S.E.2d 415 (1996), and argues that Father "did not 'do everything possible short of using physical force or a threat of punishment' to ensure [Mary] was in Mother's custody." She notes that Father picked Mary up from school or soccer practice, "indulged" her by allowing her to keep her phone, see friends, go on trips out of town, buy new clothes, "enjoy an amusement park[,]" and "mingle at various other social events." The trial court considered Mary's best interests and determined that Father did all that he could reasonably do without making Mary's situation worse. When announcing the ruling to the parties at the hearing, the trial court noted: "I cannot -- and this might be one of the most compelling parts -- I cannot find it is in the best interest of [Mary] to force visitation at this time, consistent with *Hancock*, based on what the testimony was from her."

Father was dealing with a depressed teenage girl who was self-harming. He picked her up from school because she told him she would walk home from school or practice instead of going with her mother, if he did not pick her up. Isolating her from friends or locking her in the house would likely exacerbate her condition. Mary was in therapy and improving, but therapy does not have instantaneous results. The trial court was well aware of the parties' "tumultuous history" and Father's past misdeeds -- as are we, since Mother has listed them several times all the way back to 2006 in her Omnibus Motion and her brief -- but the trial court properly considered Mary's best interests and the *current* circumstances in evaluating whether Father was in willful civil contempt.

C. Willfulness

[3] Mother next contends the trial court "misapprehended" the law regarding willful contempt by a parent in the context of a child's refusal

13. He testified, "When you are self cutting, [Mary] or any other self-cutter who refuses therapy, yes. Then the appropriate medical decision is that child is doing harm to themselves and at any point could go beyond self-cutting to self-mutilation to accidental death, that child needs to be admitted to the hospital."

to visit with or see the other parent. She also argues extensively this Court should disapprove or limit *Hancock* and that the trial court erred by relying on *Hancock*.[14] She claims that

> the Modified Custody Order clearly contains the type of "forced-visitation" provision that *Mintz* contemplated and *Reynolds* recognized, *see* 109 N.C. App. at 113, 426 S.E.2d at 104-105, making *Reynolds* precedential and *Hancock* inapposite. *See Hancock*, 122 N.C. App. at 526, 471 S.E.2d at 420 (noting the underlying consent judgment and the contempt order lacked the type of forced-visitation provision contemplated in *Mintz*). The forced-visitation provision's presence here thus vitiates challenged Findings of Fact 23-27, 29-30, 32-36, and Conclusions of Law 1-3 and 5-8, for they all assume its absence.

Mother argues that the 2015 Modified Custody Order has "implied forced visitation" provisions and Father willfully violated those "implied" provisions by not forcing Mary to go to her Mother's home, but the trial court failed to recognize these "implied" requirements of the Order based upon its interpretation of *Hancock*, 122 N.C. App. 518, 471 S.E.2d 415. Specifically, Mother argues:

> Here, the court interpreted *Hancock* and its progeny to rule otherwise, determining that Father could not be held in contempt--even though he never even attempted to use any incentive, reward, punishment, or other effective means of persuasion to ensure compliance--because the Modified Custody Order purportedly lacks an express forced-visitation provision.

Mother's argument misconstrues *Hancock* and *Reynolds* and ignores the requirement that all orders dealing with child custody and visitation, even a contempt order, must consider the best interests of the child.

In *Hancock*, the parties' son refused to go on three weekend visits with his father. *Hancock*, 122 N.C. App. at 521-22, 471 S.E.2d at 417. The trial court held the mother in civil contempt for willful failure to comply with the visitation order. *Id.* at 522, 471 S.E.2d at 417-18. On appeal, the mother argued that "there must be a showing that the custodial parent deliberately interfered with or frustrated the noncustodial parent's visitation before the custodial parent's actions can be considered willful."

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14. Mother filed a Motion for Initial *En Banc* review in this case, requesting this Court to overrule *Hancock* explicitly. The motion was denied.

Id. at 522, 471 S.E.2d at 418. This Court agreed and reversed the order of civil contempt. *Id.* at 523, 471 S.E.2d at 418. The Court noted the testimony by mother, her daughter, and the child; all of the evidence showed that the mother had gotten the son ready for visitation, packed his things, told him he had to go, put him outside for his father to pick him up while she stayed inside, and told him to get into the car with his father. *Id.* at 523-24, 471 S.E.2d at 418-19. He refused. *Id.* at 524, 471 S.E.2d at 419. The son testified that "he loved his father and wished to spend time with him, but only if his father's second wife and her children would not be there." *Id.* He said he did not "feel comfortable" with his father's wife or at his father's home, that his step-mother "called him 'a spoiled brat,' " and that the bed there was uncomfortable. *Id.* at 525, 471 S.E.2d at 419. There was evidence he "hated" his step-brother. *Id.*

This Court held there was no evidence that the mother had willfully disobeyed the court's order and she was not in civil contempt:

> Nowhere in the record do we find evidence that plaintiff acted purposefully and deliberately or with knowledge and stubborn resistance to prevent defendant's visitation with the child. The evidence shows plaintiff prepared the child to go, encouraged him to visit with his father, and told him he had to go. The child simply refused. *Plaintiff did everything possible short of using physical force or a threat of punishment to make the child go with his father. While perhaps the plaintiff could have used some method to physically force the child to visit his father, even if she improperly did not force the visitation, her actions do not rise to a willful contempt of the consent judgment.*

Id. at 525, 471 S.E.2d at 419 (emphasis added).

The *Hancock* Court further noted that the father may have a remedy by asking the trial court for an order of "forced visitation," but civil contempt was not the proper remedy:

> Where, as here, the custodial parent does not prevent visitation but takes no action to force visitation when the child refuses to go, the proper method is for the noncustodial parent to ask the court to modify the order to compel visitation. A trial judge has the power to make an order forcing a child to visit the noncustodial parent. In this case, the trial court attempted the functional equivalent of an order of forced visitation by sentencing plaintiff to jail but allowing her to purge herself of contempt by

> delivering the child over to defendant each and every time he was entitled to visitation. However, the order fails as an attempt at forced visitation.

Id. at 526, 471 S.E.2d at 420 (citations, quotation marks, and brackets omitted). The *Hancock* Court noted that a trial judge could enter an "order of forced visitation" but only if

> the circumstances are so compelling and only after he has done the following: afforded to the parties a hearing in accordance with due process; created a proper court order based on findings of fact and conclusions of law determined by the judge to justify and support the order; and made findings that include at a minimum that the drastic action of incarceration of a parent is reasonably necessary for the promotion and protection of the best interest and welfare of the child. Neither the consent judgment nor the contempt order contains any findings that the incarceration of the plaintiff is reasonably necessary to promote and protect the best interests of the child.

Id. (citation and quotation marks omitted).

Here, Mother included in her Omnibus Motion two motions which are essentially motions for a forced visitation order. She asked for a mandatory preliminary injunction requiring Father to return Mary to her home and to "exert his parental influence" to make her stay there. She also asked for "judicial assistance" in the form of mandated reunification therapy. If these motions are not requests for "forced visitation" orders, it is hard to imagine what a forced visitation request would include. Those motions are not subjects of the order on appeal. But even in a contempt order, if the trial court is to enter a contempt order that operates as an order of "forced visitation," the order may be entered only under "compelling" circumstances and

> only after he has done the following: afforded to the parties a hearing in accordance with due process; created a proper court order based on findings of fact and conclusions of law determined by the judge to justify and support the order; and made findings that include at a minimum that the drastic action of incarceration of a parent is reasonably necessary for the promotion and protection of the best interest and welfare of the child.

Id. (quoting *Mintz*, 64 N.C. App. at 341, 307 S.E.2d at 394). And this is exactly what the trial court noted it could *not* do: "this might be one of

the most compelling parts -- I cannot find that it is in the best interest of [Mary] to force visitation at this time."

Mother seeks to distinguish *Hancock* based upon the differences in the facts: the duration of the missed custodial time; the custodial status (denial of weekend visitation v. physical custody); Father's "indulgence" of Mary when at his home; and the tumultuous history of this case. We agree that no two custody cases are alike factually; "Happy families are all alike; every unhappy family is unhappy in its own way."[15] The trial court's job is to hear the evidence, find the facts, consider those facts and circumstances, and determine what action the parent should reasonably take to force visitation, consistent with the best interests of the child. *See generally Hancock*, 122 N.C. App. at 526, 471 S.E.2d at 420. The differences in the facts of the cases do not eliminate *Hancock* as a precedent supporting the trial court's order, nor is it the only case which supports the order. *See also McKinney v. McKinney*, __ N.C. App. __, __, 799 S.E.2d 280, 284-85 (2017) ("In the present case, the district court made no finding that Father refused to allow Max to live with Mother or refused to obey the custody orders. The district court did not find that Father encouraged Max to stay with him, but rather, found that he told Max that Max should go home. It is true that the district court found that Father did not punish Max or make life uncomfortable for Max while remaining in Wilmington. And these actions and inactions may have been improper, but otherwise do not rise to the level of contempt. We do not think that the findings that Father provided a high standard of living for Max which was an 'enticement' for Max to prefer living with Father is enough to rise to the level of willfulness, absent a finding supported by the evidence that Father provided a high standard of living for the purpose of enticing Max to run away from Mother rather than merely for the purpose of providing for or bonding with Max." (citations omitted)).

The need to consider the child's best interest is why cases have typically not required a parent to use "physical force" or other extreme measures to make a child visit or stay with a parent. *See generally McKinney*, __ N.C. App. at __, 799 S.E.2d at 284-85; *Hancock*, 122 N.C. App. at 525-26, 471 S.E.2d at 419-20. A certain amount of physical force would make a child go in any case, regardless of the child's age or circumstances, but it would probably never be in a child's best interest.

Mother's predictions of anarchy in enforcement of custody orders based upon Hancock -- and the trial court's order -- from allowing a

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15. Leo Tolstoy, *Anna Karenina* 3 (Melanie Hill & Kathryn Knight eds., Constance Garnett trans., 2005) (1875).

parent to ignore a court order with impunity where a child simply refuses to go are unfounded. She argues:

> Granting an alleged contemnor absolution based [sic] *Hancock*, however, violates several fundamental legal principles and perpetuates bad public policy.
>
> For instance, allowing a parent to sidestep contempt based on a child's actual or purported refusal to honor a custody order -- i.e., the adjudication of what is in the child's best interest -- effectively means that a child possesses actual or apparent authority to modify or otherwise override the ruling, *sua sponte*. This is wrong on several levels. This faulty position likewise seemingly implies that every court-ordered custody/visitation schedule automatically is subject to a child's approval, a condition previously allowed only by express provision under extreme circumstances.
>
> Further, allowing a parent to raise a child's actual or purported "wishes" as a shield against contempt liability in such circumstances perversely places the child in jeopardy of being (1) held in contempt; and/or (2) adjudicated "delinquent" or "undisciplined". It similarly exposes the alleged contemnor- parent to possible criminal prosecution for aiding a "delinquent" or "undisciplined" juvenile.

(Citations omitted).

The order on appeal did not allow Father to ignore the court's order with impunity. And neither *Hancock* nor any other case grants alleged contemnors "absolution" based simply on a child's refusal or wishes, nor does it imply that any "court-ordered custody/visitation schedule" is subject to a child's approval. The problem with Mother's efforts to hold Father in civil contempt was not the provisions of the Order or *Hancock*; it was the unique facts of this case, including Mary's mental health concerns. This is not a case of a young child simply saying "no."

III. Conclusion

The trial court did not misapprehend the law of civil contempt, either on the burden of proof or willfulness. The trial court's conclusions of law are supported by the findings of fact. We therefore affirm the order.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

HILL v. HILL

[261 N.C. App. 600 (2018)]

LISA SMITH HILL, PLAINTIFF
v.
GLENN ANTHONY HILL, DEFENDANT

No. COA17-576

Filed 2 October 2018

1. Child Custody and Support—modification of custody—loss of job—imputed income—motion pending for four years

A child support order was remanded where the dispute began when the father lost his job, he continued to pay the required support until he eventually unilaterally reduced the payments, he engaged in a lengthy job search, he eventually accepted a job at a reduced salary, and he got married and bought a new car and house. The original motion was pending for four years and the Court of Appeals could not determine whether the trial court imputed income to the father and the basis of the imputation for each time period. The matter was remanded for correction of the erroneous date of the father's settlement with his prior employer along with related appropriate corrections, and for the basis for any imputations of income.

2. Child Custody and Support—support—modification—loss of job—depletion of estate

The trial court was not authorized to base a child support modification solely upon depletion of the husband's estate in a case in which a child support order was entered, the husband lost his job and engaged in a long job search during which he paid the child support obligation from his assets until his assets ran low, the husband eventually accepted a job at a lower salary, and four years elapsed from the motion to the hearing. Although depletion of the husband's estate may be a proper basis to establish an alimony obligation, the same is not necessarily true for child support. The case was remanded for findings to clarify whether the trial court was actually imputing income and the basis for imputing income.

3. Divorce—alimony—calculation of amount

An award of alimony arrears was remanded for calculation of the correct amount owed.

4. Contempt—civil—failure to pay alimony and support—unilateral reduction

A trial court order holding a husband in contempt under N.C.G.S. § 5A-21(a) for failure to pay alimony and child support was

remanded for a determination of arrearages and purge conditions where four years elapsed between the filing of a motion to modify and the hearing. In the interim, the husband lost his job, engaged in a long job search during which he paid the amounts owed from his assets, and eventually unilaterally reduced his payments. Although a supporting parent may file a motion to reduce his child support obligations, unilaterally reducing his payments entirely could subject him to contempt. Because of the time periods involved in this case, the reduction in alimony may not have been willful and it was possible that the husband was not in contempt for alimony if he was paying the new, reduced amount.

5. Contempt—civil—notice of noncompliance—argument waived

The husband in a child support and alimony matter waived any argument concerning notice of the acts for which he could be held in contempt when he actively participated in the trial without raising his objection.

6. Attorney Fees—alimony and child support action—modification

An award of attorney fees in a child support and alimony action was vacated where the matter extended over several years, the circumstances existing on the dates of the motions for modification differed greatly, and the trial court did not specify the basis for the award.

Appeal by defendant from order entered 12 May 2016 by Judge Melinda H. Crouch in District Court, New Hanover County. Heard in the Court of Appeals 11 January 2018.

Block, Crouch, Keeter, Behm & Sayed, LLP, by Christopher K. Behm and Linda B. Sayed, for plaintiff-appellee.

Jonathan McGirt, and Sandlin Family Law Group, by Deborah Sandlin, for defendant-appellant.

STROUD, Judge.

Defendant Glenn Anthony Hill ("Husband") appeals from the trial court's order modifying alimony and child support. Husband argues that the trial court erred by imputing income to him during his period of unemployment after an involuntary termination, based on bad faith, despite its findings he was diligently seeking a job with earnings similar to his prior jobs. Husband also argues that the trial court erred by holding

him in contempt of court for failure to pay his support obligations during a portion of the four years prior to the hearing, since plaintiff Lisa Smith Hill's ("Wife")'s contempt motion did not give him notice of her claim on the entire time period, and because the trial court's order held him in contempt for violating orders which were not actually in force at the time of the contempt, given the trial court's simultaneous modification of the order effective back to the dates of filing of the motion to modify. In addition, he argues the trial court erred in its award of attorney fees of a lump sum, without differentiation between the amounts awarded for each of the three claims -- modification of child support, alimony, and contempt -- and without the required findings of fact required for every claim. For the reasons explained below, we affirm in part and reverse and remand in part the trial court's order on alimony and child support; conclude the trial court did not err in finding Husband in civil contempt for failure to pay based upon his arguments that the order was not still "in force" and that he did not have proper notice, but reverse and remand for any revisions needed to the purge conditions based upon arrearages owed; and reverse and remand the trial court's order on attorney fees.

Background

The parties were married in 1992 and have three children. They separated in October 2010 and were divorced in July 2012. On 15 March 2011, they entered into a consent order regarding child custody, child support, and post-separation support; Husband was required to pay child support of $3,500.00 per month and postseparation support of $4,500.00 per month and to maintain medical insurance on Wife and their children. When the consent order was entered, Wife was unemployed and Husband was working in China. The order did not make detailed findings regarding the parties' expenses or Husband's income, but Husband was employed with Company in China and earned $543,000.00 in 2011.

The order which is the subject of this appeal addresses Husband's motions to modify the alimony and child support obligations set by the consent order entered in 2011[1] and other pending motions. On 15 January 2012, Husband was involuntarily terminated from Company. On 7 February 2012, Husband filed a motion to modify his child support obligation based upon his job loss. On 18 June 2012, he moved to

1. In some portions of this opinion, we will refer to both the alimony obligation and the child support obligation together as Husband's "support obligation" since the findings of fact generally apply to both obligations. We will differentiate between the two obligations in portions of the opinion where only one obligation is addressed.

modify his postseparation support obligation. On 30 July 2012, the trial court held a hearing on Husband's motion to modify child support and Wife's alimony claim. Both Husband and Wife were unemployed at the time of this hearing.

On 31 August 2012, Wife began working with the New Hanover County Schools as a speech pathologist. On 12 September 2012, the trial court entered an order on alimony. Although Husband was unemployed, the trial court set permanent alimony at $4,500.00 per month -- the same as when he was earning over $500,000.00 annually -- based upon his estate of $627,618.00. The order found that both parties would have to deplete their estates since neither was employed. Also, on 12 September 2012, the trial court entered an order denying modification of child custody and child support, finding no substantial change in circumstances to justify modification. On 19 September 2012, Husband filed another motion to modify both permanent alimony and child support, based in part upon Wife's having gotten a job between the time of the hearing on modification of child support and setting alimony and entry of the orders based upon that hearing. On 25 September 2012, Husband filed a Rule 59 motion alleging that the trial court erred by failing to include any findings regarding his involuntary reduction in income.

In May 2013, Husband filed a lawsuit in federal court against Company asserting claims arising out of his termination. On 31 July 2013, the trial court heard Husband's Rule 59 motion, and on 30 August 2013, the court entered an order that set aside the 12 September 2012 order denying modification of child support and ordered a new trial on child support. Husband's motion to modify child support filed on 7 February 2012 remained unresolved. On 6 December 2013, Company's motion to dismiss Husband's federal lawsuit was granted in part; subsequently, on 17 December 2013, Husband signed a settlement agreement with Company.

Nearly three years later, on 5 April 2016, the trial court heard all of the pending motions: both of Husband's motions for modification of his support obligations (the motion for modification of child support filed on 7 February 2012 and motion to modify alimony and child support filed 19 September 2012); Wife's response to Husband's motion to modify permanent alimony and motion to modify child support, including a motion to deviate from the child support guidelines; and Wife's motion for contempt for failure to pay child support and alimony filed on 31 July 2013. The trial court entered its order addressing the motions on 12 May 2016, and Husband timely filed notice of appeal to this Court.

Analysis

As noted above, Husband raises three issues on appeal. We address each in turn.

I. Modification of Alimony and Child Support

Husband argues that the "trial court erred as a matter of law and abused its discretion in setting awards of alimony and child support based upon imputation of income and the trial court's deliberate depletion of defendant's estate." (Original in all caps). This argument has four sections: (a) inadequacy of the findings of fact to support imputation of income; (b) failure to consider Husband's actual income during several periods of time and retrospectively basing his obligations upon his current income; (c) improperly finding Husband's ability to pay his obligations based upon depletion of his estate; and (d) a mathematical error in the calculation of alimony arrearages.

Most issues in this appeal are based upon the determination of Husband's income and ability to pay child support and alimony when he was unemployed. Because his initial motion to modify was filed in February 2012, and the motions were not heard until over four years later, on 5 April 2016, the trial court's order addressed the parties' incomes and expenses during several distinct time periods. From February 2012 until 31 August 2012, both parties were unemployed. From 31 August 2012 until 29 June 2015, Wife was employed and Husband was not. On 29 June 2015, Husband began his new job with Ebara in Nevada, with an income of $275,000.00 plus an annual performance incentive and various benefits. Based upon the date of the motions filed, the trial court considered the motion to modify child support from March 2012 to the date of hearing, and the motion to modify alimony from October 2012 to the date of hearing. Although we understand that our trial courts are overburdened and delays in hearings are sometimes inevitable, most of the issues and legal and mathematical complications in this case would have probably been avoided if Husband's motions to modify his support obligations had not been delayed for approximately four years after filing.

A. Inadequacy of the findings of fact to support imputation of income

[1] The current dispute began after Husband was involuntarily terminated from his job in China on 15 January 2012. He was then unemployed and engaged in a job search until 29 June 2015. Since his only regular income was from his employment, he had no income during this time. The trial court found that Husband had no income from March

2012 until December 2013. In 2014, Husband received $351,937.52 gross funds from the settlement of his lawsuit against Company, and in one analysis of Husband's income, the trial court averaged this amount over the months of 2014, finding Husband's income as $29,238.00 per month. From January to June 2015, the trial court found Husband again had no income. As of July 2015, when Husband began working for Ebara, until December 2015, the trial court used Husband's actual income, which averaged to $27,250.00 per month. The trial court also did an alternative analysis of Husband's income, averaging Husband's total income received from 1 March 2012 until 31 December 2014, or 34 months; the total W-2 income was $456,701.00, for an average monthly gross income of $13,432.00.

Although Husband had no income during most of the four year period, the trial court's order did not reduce his child support obligation for that time period, but set child support at $3,500.00 per month from March 2012 to 1 June 2015 and increased it to $4,200.00 per month, plus 15% of any annual bonuses received as of 1 July 2015. Husband's alimony obligation was reduced from $4,500.00 per month to $3,500.00 per month, back to 1 October 2012, to be paid for ten years. The trial court also held Husband in willful contempt for his failure to pay child support and alimony from June 2013 through March 2016.

Husband argues that the trial court erred by failing to set his support obligations based upon his actual income from March 2012 until July 2015, because the findings do not support imputation of income. Wife argues that the trial court made sufficient findings to support imputation of income to Husband, and in the alternative, that the trial court actually did not impute income to Husband but instead considered his "income from all available sources" or averaged his "income over four years" and determined that depletion of his estate to pay his obligations would be proper.

Normally, both alimony and child support are set based upon the parties' actual incomes at the time of the order. *See generally Frey v. Best*, 189 N.C. App. 622, 627, 631, 659 S.E.2d 60, 66, 68 (2008).

Regarding alimony, this Court has explained that

> Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order. To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed [his or] her income in bad faith. In the context of alimony, bad faith means that the spouse is not living up to income potential in order to avoid or frustrate

> the support obligation. . . . The trial court might also find bad faith, or the intent to avoid reasonable support obligations, from evidence that a spouse has refused to seek or to accept gainful employment; willfully refused to secure or take a job; deliberately not applied himself or herself to a business or employment; or intentionally depressed income to an artificial low.

Works v. Works, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (citations and quotation marks omitted).

On child support, both case law and the Child Support Guidelines address when income may be imputed:

> The North Carolina Child Support Guidelines state:
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> If either parent is voluntarily unemployed or underemployed to the extent that the parent cannot provide a minimum level of support for himself or herself and his or her children when he or she is physically and mentally capable of doing so, and the court finds that the parent's voluntary unemployment or underemployment is the result of a parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income.
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> The primary issue is whether a party is motivated by a desire to avoid his reasonable support obligations. To apply the earnings capacity rule, the trial court must have sufficient evidence of the proscribed intent. The earnings capacity rule can be applied if the evidence presented shows that a party has disregarded its parental obligations by:
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> (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) willfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or (8) intentionally leaving his employment to go into another business.
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> The situations enumerated are specific types of bad faith that justify the trial court's use of imputed income or the earnings capacity rule.

Lueallen v. Lueallen, __ N.C. App. __, __, 790 S.E.2d 690, 703-04 (2016) (citation, quotation marks, and ellipses omitted).

Moreover,

> It is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified. . . .
>
> It is clear, however, that before the earnings capacity rule is imposed, it must be shown that the party's actions which reduced his income were not taken in good faith. Thus, where the trial court finds that the decrease in a party's income is substantial and involuntary, without a showing of deliberate depression of income or other bad faith, the trial court is without power to impute income, and must determine the party's child support obligation based on the party's actual income.

Ellis v. Ellis, 126 N.C. App. 362, 364-65, 485 S.E.2d 82, 83 (1997) (citations, quotation marks, and brackets omitted).

Husband contends that the trial court erred by imputing income to him during various time periods covered by the order and requiring him to deplete his estate to pay alimony and child support as ordered during times when he was unemployed. He argues that the evidence and findings of fact do not show he acted in bad faith in his job search after his involuntary termination in January 2012. Husband also contends that the trial court had in prior orders "repeatedly endorsed [Husband's] efforts to seek a favorable recovery or settlement from his dispute with Company, and had also indicated in effect that [Husband's] pursuit of suitable executive-level re-employment would best meet the needs of the parties." He argues that in the order on appeal, "the trial court made an abrupt about-face, somersaulting over its previous approval of [Husband's] actions, and now harshly and unreasonably began blaming [Husband] for his 'bad faith' in 'purposely suppress[ing]' his income during his period of involuntary unemployment, as evidence of his 'willful disdain' for his support obligations."

Perhaps seeking to minimize the apparent inconsistency in the trial court's treatment of Husband's unemployment over the course of the case since 2012, Wife responds by arguing that the trial court did not impute income based upon Husband's deliberate suppression of his income but instead imputed income based upon findings that Husband was "indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and

children." In his reply brief, Husband addresses Wife's argument and notes that the trial court's findings do not establish that Husband had engaged in "excessive spending" but he had engaged in only "perfectly ordinary human behavior" such as getting married, buying a car, and buying a house.

Although the trial court was not entirely clear on its reasons for imputing income -- or even *if* it actually imputed income -- Wife is correct that the trial court made findings which may support imputation of income based upon its determination that Husband had acted in deliberate disregard for his support obligations as of June 2013, when he unilaterally reduced his support payments to $300.00, in conjunction with his increases in spending which coincided with his new relationship with his girlfriend, now wife, although he was still unemployed. But if the trial court imputed income for this reason, the reason for imputation in 2012 remains in question. Although Husband was paying his support obligations then, there were pending motions to modify and Husband requested modification effective as of the date of his motion.

The order on appeal is 38 pages long and has 136 paragraphs of findings of fact, plus the 21 attached child support worksheets for calculations for various time periods over the course of the case. Most of the findings are not challenged as unsupported by the evidence. Despite the extensive detail in the order, we have had difficulty reviewing the calculation of alimony and the modification of child support because the order does not include findings of Husband's expenses for any time period covered by the order, although there are findings as to Wife's and the children's expenses. In addition, as noted above, it is not clear if the trial court did actually impute income to Husband and if so, the basis for imputation during the various time periods.

Husband challenges Findings 52, 53, and 61 and these findings of fact are important in the trial court's determination that Husband was willfully suppressing his income or acting in bad faith. Wife acknowledges that the date of settlement in the findings is incorrect, but argues these findings are unnecessary to support the trial court's order:

> 52. *On December 6, 2012*, the federal judge in Richmond, Virginia, granted [Company's] motion to dismiss part of his lawsuit, including his request for punitive damages, attorney's fees and specific performance.
>
> 53. *Even after this devastating evisceration of his federal court action, Defendant Glenn Anthony Hill did not settle the [Company] lawsuit for another year.*

> 54. After [Company] terminated Defendant Glenn Anthony Hill from employment in January 2012, Defendant Glenn Anthony Hill sent out hundreds of resumes, networked with others in his industry, and worked with headhunters to search for executive or engineering jobs for which he is suited. He had job interviews in London, Malaysia, several in China and a few places in the United States.
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> . . . .
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> 61. Defendant Glenn Anthony Hill's refusal to look for any work outside of executive or engineering positions for such an extended period of unemployment, *his refusal to settle the [Company] lawsuit for a year* after the adverse outcome in federal court, and his stubborn refusal to use his substantial estate to pay reasonable support shows a naïve indifference to fulfill support obligations and demonstrates a bad faith avoidance of his support obligations.

(Emphasis added).

Finding No. 52 incorrectly states the date of settlement of the lawsuit as 17 December 2012, but it was actually 17 December 2013. Thus, Husband settled the lawsuit with Company only *eleven days* after the "devastating evisceration of his federal court action" against Company, not over a year later. This is not a mere typographical error, as demonstrated by the trial court's Findings Nos. 53 and 61, which stress that his "refusal to settle" for a year after the adverse outcome shows his bad faith and "naïve indifference" to his support obligations. Settling only *eleven days* later would not show bad faith or "naïve indifference," at least not based upon an unreasonably prolonged pursuit of the lawsuit against Company. In contrast, Finding No. 54, above, indicates that Husband was working hard to find a new job: he "sent out hundreds of resumes, networked with others in his industry, and worked with headhunters to search for executive or engineering jobs for which he is suited" and "had job interviews in London, Malaysia, several in China and a few places in the United States." These findings and some others addressing Husband's efforts to find a new job seem inconsistent with the trial court's finding that Husband acted in bad faith. For example, the finding that Husband was diligently seeking a new "executive or engineering job for which he [was] suited" – apparently the entire time, since the finding does not indicate he ever stopped seeking a new job -- seems to conflict with Finding No. 82:

> 82. Despite submitting many applications for employment and his other efforts to secure a job in his field, considering his educational background and experience, his overall good health and age of 50 years, remaining unemployed continuously for 39 [sic, i.e., 42] months in a national economy on the upswing simply cannot be rationalized as a reasonable period of involuntary unemployment.

That fact that Husband's job search took a long time does not mean it was in bad faith. Husband argues no evidence was presented to the trial court regarding the "national economy" from 2012 through 2016, and in particular, no evidence regarding the state of the industry or job market in which Husband was seeking employment. Our record does not even clearly identify the industry in which he was seeking a job because of the confidentiality agreement regarding Company, and the transcript also includes little information on his job.

At the beginning of the trial, the parties addressed issues which may arise during trial regarding the confidentiality agreement and sealed records regarding Company and then made the following stipulation regarding Husband's job search:

> And we can also put on the record a further stipulation that the plaintiff acknowledges that Mr. Hill applied for in excess of probably 100 jobs for executive type positions for various companies across the United States and across the world seeking employment from--after his termination in January of 2012 until he got a job in July--or June of 2015.[2]

Wife does not direct us to any evidence regarding the national economy, the job market, or the state of the industry in which Husband sought employment. Wife's response to Husband's argument is simply that "[Husband] purportedly futilely searched for an executive job for a period of nearly 3½ years." But Husband's search was not a "purported" search; it was a real search, at least according to Wife's stipulation and the trial court's Finding No. 54. Nor was his search "futile," although it may have been prolonged, since he did eventually find the executive-level job he was seeking. There is also no evidence that Husband was offered jobs but turned them down.

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2. The only information we can find regarding Husband's area of expertise is his testimony that he had worked in "power generation" and in "import-export" and his background was in engineering.

This case is quite different from *Lueallen*, where this Court addressed imputation of income based upon the trial court's determination that the mother's continued unemployment for three years after she had voluntarily quit her job as a teacher. *See generally Lueallen v. Lueallen*, __ N.C. App. __, 790 S.E.2d 690. In *Lueallen*, the mother argued that she had been persistently seeking a new job, but the trial court found she had actually failed to apply for jobs in Mecklenburg County, despite her allegation she was "currently actively seeking" jobs there in her verified motion to modify child support. *Id.* at __, 790 S.E.2d at 704. There was also "extensive testimony at trial regarding Mother's educational and professional qualifications and her work history." *Id.* at __, 790 S.E.2d at 704. Based upon her quitting her prior job without having another job lined up, her failure to seek a new job for three years, and her job qualifications and experience, this Court affirmed the imputation of income. *Id.* at __, 790 S.E.2d at 704-05.

An unsuccessful or prolonged job search after an involuntary job loss is not necessarily evidence of a bad faith suppression of income. For example, in *Ludlam v. Miller*, 225 N.C. App. 350, 739 S.E.2d 555 (2013), both the husband and wife lost their jobs and had been unsuccessful in finding new jobs but the trial court imputed income to both husband and wife to set child support. This Court reversed the trial court's order and noted that

> [t]he trial court found that both Plaintiff and Defendant had searched for employment, but both had been unsuccessful. Less clear from the order is whether the trial court found that Plaintiff and Defendant had acted in bad faith. Our general impression is that the trial court found no bad faith. However, a literal reading of this finding of fact suggests that the trial court found bad faith which was insufficient to impute income at a prior income level, but that it found bad faith that was sufficient to impute income at the minimum wage. Neither of the above interpretations of the trial court's order would support imputation of income at minimum wage.

Id. at 358, 739 S.E.2d at 560.

Based upon the prior orders for alimony and regarding discovery, Husband argues the trial court had recognized the need for Husband to pursue his job search for an "executive or engineering job" for which he was suited and to seek recovery for his termination from Company, but in its order, reversed course and found he should have settled his

lawsuit with Company sooner and taken a lesser job instead of continuing to seek a job similar to his prior employment. For example, in the original 2012 alimony order, the trial court found

> 10. Defendant was terminated from his employment in 2012 and has been offered a severance package that includes compensation of $255,000, vacation pay of $12,500 and a bonus ranging from $66,000 to $89,000. Defendant has not accepted this severance package as he believes that he may be entitled to more money and/or reinstatement of his position. *Defendant is reasonably exercising his earning capacity and capabilities at the present time.*

(Emphasis added).

Despite the trial court's finding *in September 2012* that "*Defendant is reasonably exercising his earning capacity and capabilities at the present time*," in the order on appeal, the trial court found that "Defendant Glenn Anthony Hill's *naive indifference to earn any income from January 2012 to July 2015 is not justified.*" (Emphasis added). These findings are contradictory, at least for 2012. The trial court could perhaps find that Husband *was* reasonably exercising his earning capacity in 2012, even though he was unemployed and seeking a new job, but at some point between 2012 and 2015, his delay in finding a new job became unreasonable. We cannot determine from the order the point when this change occurred. And this date, if it exists, would be important, because it may be a pivotal date for purposes of looking back to impute income to Husband based upon bad faith in his job search and for modifying his support obligations.

Although the trial court was sympathetic to Husband's job search in 2012, it appears from the 2016 order that the trial court changed its view of Husband's continued unemployment. The prior order was entered in 2012, but Husband's unemployment continued until June of 2015. And based on other findings of fact, as Wife contends, the trial court might have based its imputation of income on Husband's excessive spending "in deliberate disregard for his support obligations" even while he was still unemployed and at the same time, unilaterally reducing his monthly payments to Wife from $8,000.00 to $300.00 -- although as noted above, this still cannot explain the trial court's failure to modify the support obligations prior to June 2013.

The trial court detailed the unexplained decreases in Husband's bank account balances along with the drastic changes in Husband's lifestyle beginning in 2013, which coincided perfectly with his decision to

reduce his payments by 96%, to $300.00 and with meeting his girlfriend. Husband still had a balance of over $100,000.00 in his bank account as of the end of 2012, and on 12 March 2013, he paid $27,300.00 cash for a 2009 BMW two-door convertible.[3] By the end of May 2013, his bank account was down to just over $26,000.00 -- a decrease of $46,700.00 in just two and half months, although Husband was still "purportedly liv[ing] frugally" in a one bedroom of a home at that time. At just about this time, Husband met his girlfriend, now wife, on Match.com. In October 2013, Husband filled out a lease application for a new apartment in High Point where he stated his income as $150,000.00 per year from GA Hill and Associates -- although he testified he received no income from this business.[4]

A few months later, in January 2014, Husband received the proceeds from the settlement with Company, and he deposited $251,098.95 into his savings account. By the end of January, Husband had withdrawn $110,500.00 from the savings account -- but he paid Wife only $300.00 that month. By February 2014, he had moved to the apartment in High Point with his girlfriend. In June 2014, Husband got $6,000.00 as a gift from his father to buy an engagement ring for his new girlfriend. In November 2014, he married her, and they had two formal weddings, one in Raleigh and one in China. By the end of 2014, his bank account balance was down to $28,472.60 -- and he was still paying Wife $300.00 per month. And even after Husband got his new job in June 2015, he still did not resume paying alimony.

In addition, several findings note that the trial court determined Husband was not credible in his testimony and evidence regarding financial matters, including "his credit card debt or other loans" and his testimony about his new wife's "income and employment status and her ability to share in the cost of their living expenses." And as Wife stresses, the trial court found that Husband "indulged in excessive and unnecessary spending when he moved to High Point with his girlfriend (now his wife) and even more so when they moved to Reno, and continued to avoid his financial obligations to support his children and his ex-wife."

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3. A two-door convertible is not exactly a car suitable for three children, but Husband was not exercising his visitation with the children.

4. Husband organized GA Hill & Associates, LLC, through which he planned to operate "an import/export business with partners in China" in 2012. Husband claimed the business failed and he lost "tens of thousands of dollars." The trial court did not find that Husband had income from this business or from the other business he attempted to start in China, but the trial court also did not find Husband's testimony about these businesses credible.

Husband responds that the findings do not address why it is "excessive and unnecessary spending" to get remarried and, after getting a new job, to buy a new house near his new job. The definition of "excessive" spending will vary depending upon the parties' circumstances and certain types of expenses, such as housing and food, are necessities. *See, e.g.*, *Beall v. Beall*, 290 N.C. 669, 678-79, 228 S.E.2d 407, 413 (1976) ("While some of [defendant's living expenses] appear to be extravagant, or overestimated, and several might be eliminated, others are essential. Thus, if only the projected monthly rent ($190.00); food ($100.00); utilities ($35.00) and car payments ($204.00) are counted, defendant would still need $529.00 monthly ($6,348.00 annually) to support himself. However, income taxes, automobile insurance, and laundry must be paid; most certainly he will have medical expenses and other unexpected demands for money from time to time. Even so, his projected monthly expenditures of $1,789.00 are beyond his means. We note that considered on an annual basis these expenses exceed defendant's total maximum income as found by the trial court."). Husband argues that the trial court did not distinguish what amounts, if any, of his expenditures were "extraordinary overspending" as opposed to reasonable living expenses. But the trial court's findings carefully detail Husband's bank account balances over time along with his actions in disregard of his support obligations. Husband was free to remarry, but payment of alimony or child support "may not be avoided merely because it has become burdensome, or because the husband has remarried and voluntarily assumed additional obligations." *Crosby v. Crosby*, 272 N.C. 235, 238, 158 S.E.2d 77, 80 (1967) (citations and quotation marks omitted); *see also Frey*, 189 N.C. App. at 630, 659 S.E.2d at 67 ("Payment of support for a child of a former marriage may not be avoided merely because the husband has remarried and thereby voluntarily assumed additional obligations. Increases in expenses that were voluntarily assumed additional obligations, including entering into another marital and family relationship, although they may render the child support payments more burdensome, do not justify a reduction in such payments." (Citations, quotation marks, brackets, and ellipses omitted)). These findings of Husband's reduction in support payments coupled with his increased spending on his new life with his girlfriend and his ultimate remarriage primarily focus on the period when he was unemployed. Once he had a new job, there was no need for the trial court to impute income, and it did not, so his expenses based upon his remarriage, if any, did not affect the support calculations as reflected by the order after he began working for Ebara.

Yet we still have some concern about whether the erroneous finding of the date of Husband's settlement with Company was a significant

factor in the trial court's determination that Husband acted in bad faith and in its imputation of income to Husband. "In orders of child support, the trial court should make findings specific enough to indicate to the appellate court that due regard was taken of the requisite factors." *Burnett v. Wheeler*, 128 N.C. App. 174, 176, 493 S.E.2d 804, 806 (1997). Based on Findings Nos. 52, 53, and 61, it is possible that the trial court's change of attitude toward Husband's extended job search was influenced by the belief he had delayed the settlement for over a year after it would be reasonable and responsible to resolve the lawsuit, so he would have the funds from the settlement available, and the potential cloud hanging over his ongoing job search could be removed. In addition, although the trial court may have relied upon Husband's excessive spending in disregard of his support obligations as of June 2013, when he unilaterally reduced his support dramatically, his motion to modify child support extends back to March 2012. Even though he was still paying as ordered in March 2012, he could have been entitled to a reduction for any time period when he was involuntarily unemployed and not excessively spending or acting in bad faith. Because we cannot determine whether the trial court imputed income and the basis for imputation for each of the time periods, and especially prior to June 2013, we must remand to the trial court for correction of the date of the settlement with company and any revisions the trial court deems appropriate to the other challenged findings which rely on the erroneous date. If the trial court imputes income, it should state the basis for imputation for each time period.

We therefore reverse the trial court's erroneous findings regarding the date of the settlement with Company and related findings regarding Husband's delay in settlement and the imputation of income to Husband based on this refusal. On remand, the trial court shall correct the findings regarding the date of settlement and make any additional findings it deems fit based upon the correct date. In addition, the trial court shall clarify whether it imputed income to Husband from January 2012 until July 2015 and make any additional findings it deems fit regarding imputation of income, if the trial court is basing the support obligations upon imputation of income based upon bad faith or suppression of income.

B. Averaging of income

[2] Husband also argues that instead of imputing income, the trial court relied upon funds Husband actually received while he was unemployed, averaged retroactively over the period of unemployment. In the order,

one analysis of Husband's income finds that he had no income for many months, but the trial court still kept the child support obligation at the same amount as it had been when Husband was earning over twice what he eventually began earning at his new job at Ebara and reduced alimony only by $1,000.00 per month. The trial court also did another analysis of Husband's income, finding an average income over 34 months of $13,432.00 per month.

Because the trial court considered the settlement funds from the Company and his new job in determining whether he was entitled to any reduction of either support obligation, Husband argues that "[t]his case exemplifies the perils of adjudication with '20/20 hindsight,' " and specifically, the prejudice that arises when adjudication of a motion to modify is long delayed -- in this case, roughly four years. He argues that by averaging out funds retroactively over the nearly four year period, the trial court was penalizing Husband for failure to pay in 2012 and 2013 as if he actually had those funds in 2012 and 2013. If Husband's motions to modify had been heard in 2012 -- before he had received any settlement funds, before he got a new job, and before he had even met his new wife -- the circumstances would have been much different. His job search had not been going on for long, and there would have been no way to know when he would actually find a job or how much it would pay, or when his lawsuit against Company would be resolved and how much the recovery would be.

Ultimately, the trial court found that "[d]espite his extended unemployment, there has been no significant change in [Husband]'s ability to pay child support to [Wife] since entry of the Order." In other words, the trial court found that although Husband was earning $543,000.00 per year when the order was entered in 2011, and he was unemployed with no income for 42 months, and he got a new job in July 2015 making about half what he had been making in 2011, his ability to pay was not significantly changed even while he had no income. Mathematically, these numbers present an obvious question: how is an involuntary decrease in income from $543,000.00 to zero not a significant change? During the 42 months Husband was unemployed, he would have needed $336,000.00 to pay the $8,000.00 per month he was required to pay. His only income during that time was the settlement from Company, in a gross amount of $351,937.52; his net income left after taxes was $251,098.95. He also had to pay attorney fees related to the settlement of $29,000.00, leaving him with $213,000.00. Even if he had used all of the settlement funds to pay his support obligations, he would still have had a shortfall of $123,000.00. The trial court dealt with this mathematical

problem by finding that "[t]he fact that [Husband's] income decreased does not mean that he is entitled to a reduction in alimony or child support, especially when the needs of the minor children and [Wife] did not decrease (and actually increased) and he is able to make the payment as originally ordered by using his estate, notwithstanding his reduction in income." The trial court recognized that Husband would have to deplete his estate to pay his support obligations.

In Finding No. 40, the trial court noted that in January 2012, Husband's Wells Fargo checking account had a balance of $363,227.36; he then transferred $300,000.00 from this account to a Wells Fargo savings account. By 31 August 2013, this savings account was depleted down to $6,009.94. The findings then detail various other bank account balances, deposits and withdrawals. The trial court found that "[d]uring this period, [Husband's] total monthly support obligation to [Wife] was $8,000.00" and at that time, Husband was living "frugally" in one bedroom apartments and he "offered no explanation as to how or why he dissipated his large cash accounts." In June 2013, Husband stopped paying his support as ordered and paid only $500.00 that month, then paid only $300.00 per month from July 2013 to June 2015.

These findings show that Husband stopped receiving income as of January 2012, but continued to pay $8,000.00 support each month through May 2013, a period of 17 months. Thus, he paid out $136,000.00 to Wife, which would explain at least that portion of the depletion of his bank account, but would still leave $227,227.36. Husband's living expenses at that time were low, and the trial court is correct that Husband was depleting his account at a rate far beyond the amount needed to pay support, with no explanation of how he may have spent the additional $227,227.36. In summary, the trial court determined that Husband still had or should have had sufficient funds to continue paying support as originally ordered by depleting his estate. It is correct that he could continue to pay $8,000.00 per month, despite having no income, for a finite period with his savings account. The trial court also made findings regarding his remaining estate, although Husband notes those findings show that most of his remaining funds were in 401K accounts or other retirement accounts not readily accessible without incurring substantial taxes and penalties. The question is whether his support obligations can be set based upon depletion of his estate so that he must continue to pay support at the level set when his income was over $500,000 per year, even when he had no income.

C. Depletion of Estate

(1) Alimony

The original consent order entered on 15 March 2011 and the alimony order entered on 12 September 2012 both required Husband to pay alimony of $4,500.00 per month. The order on appeal reduced alimony to $3,500.00 per month, effective as of 1 October 2012. Although the trial court reduced his alimony obligation, Husband argues that the trial court abused its discretion by not reducing his alimony sufficiently. His income was over $500,000.00 annually when the $4,500.00 obligation was established, but he had no income other than the settlement proceeds from 12 January 2012 until 29 June 2015, when he was hired by Ebara. Again, husband argues the trial court based the modified alimony on hindsight, since by the time of trial, his period of unemployment had ended. Wife essentially acknowledges the trial court's hindsight, arguing that "to whatever extent [Husband] had no income on the date that he filed his motion to modify alimony, that condition was cured by the Company Lawsuit settlement he received in early 2014 and his employment with Ebara in July 2015." She argues the trial court made extensive findings of Husband's "excessive and unnecessary spending to avoid his support obligations" during his period of unemployment and acted within its discretion in modifying alimony.

An alimony order "may be modified or vacated at any time, upon motion in the cause and showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-16.9(a) (2017). The party moving for a modification bears the burden of showing "a substantial change in conditions" so "the present award is either inadequate or unduly burdensome." *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980). We review the trial court's determination of the amount of alimony for abuse of discretion. *See*, *e.g.*, *Kelly v. Kelly*, 228 N.C. App. 600, 601, 747 S.E.2d 268, 272-73 (2013) ("Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." (Citations omitted)).

When setting alimony, the trial court must consider and make findings of fact on the factors in N.C. Gen. Stat. § 50-16.3A (2017), but if the

trial court has made the required findings, the amount of alimony is not reviewable absent an abuse of discretion. *See Works*, 217 N.C. App. at 350, 719 S.E.2d at 221 ("It is well-established that the amount of alimony is determined by the trial judge in the exercise of her sound discretion and is not reviewable on appeal in the absence of an abuse of discretion, and that a ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." (Citations, quotation marks, and brackets omitted)). To modify an alimony obligation set by a prior order, the trial court must compare the current financial situation to the time when the prior alimony order was entered, to see if there has been a change in the financial needs of the dependent spouse or in the ability to pay of the supporting spouse:

> As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay.
>
> . . . .
>
> To determine whether a change of circumstances under G.S. 50-16.9 has occurred, it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony awarded under G.S. 50-16.5. That statute requires consideration of the estates, earnings, earning capacity, condition, accustomed standard of living of the parties and other facts of the particular case in setting the amount of alimony.

Rowe v. Rowe, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982) (citations omitted).

As a general rule, a supporting spouse will not be required to deplete his estate to pay alimony. *See*, *e.g.*, *Beaman v. Beaman*, 77 N.C. App. 717, 722, 336 S.E.2d 129, 132 (1985) ("Ordinarily, the parties will not be required to deplete their estates to pay alimony or to meet personal expenses."). But sometimes, where the estate of the dependent spouse is not sufficient to meet her reasonable needs, and the estate of the supporting spouse is not sufficient to meet his own needs in addition to payment of alimony, the trial court may consider whether depletion of the supporting spouse's estate would be fair. *See*, *e.g.*, *Swain v. Swain*, 179 N.C. App. 795, 799, 635 S.E.2d 504, 507 (2006). Although some cases from our Supreme Court

> appear to disfavor alimony awards that result in estate depletion for one party or the other, those decisions by no means prohibit such awards. Rather, all of these cases cite "fairness and justice to all parties" as the principle to which an alimony award must conform. Thus, we consider whether the court's award in the present case is fair to all of the parties.

Id. (citations omitted).

In considering whether depletion of the estate is fair, the trial court must compare the estates and needs of the parties. *See generally id.* In prior cases, some of the important factors were the difference between the estates, the rate at which each party would need to deplete his or her estate, the prospects for either party to improve his or her earnings in the future, and the term of payment of the alimony. *See id.* ("Considering that plaintiff's estate is substantially larger than defendant's estate, it would be unfair to require defendant to further deplete her estate while allowing plaintiff to maintain his. Instead, the trial court ordered a reduction in alimony from $4,300 per month to $3,600 per month. This award does not fully meet defendant's living expenses and is greater than plaintiff's disposable income after meeting his own expenses. Because the award requires both parties to deplete their estates to meet their living expenses, the trial court's reduction of alimony was fair to both parties, and the trial court did not abuse its discretion.").

In *Williams v. Williams*, this Court discussed the comparison of estates of the dependent and supporting spouses:

> The financial worth or "estate" of both spouses must also be considered by the trial court in determining which spouse is the dependent spouse. We do not think, however, that usage of the word "estate" implies a legislative intent that a spouse seeking alimony who has an estate sufficient to maintain that spouse in the manner to which he or she is accustomed, *[t]hrough estate depletion*, is disqualified as a dependent spouse. Such an interpretation would be incongruous with a statutory emphasis on "earnings," "earning capacity," and "accustomed standard of living." It would also be inconsistent with plain common sense. If the spouse seeking alimony is denied alimony because he or she has an estate which can be spent away to maintain his or her standard of living, that spouse may soon have no earnings or earning capacity and therefore no way to maintain *any* standard of living.

> We think, therefore, that the trial court consideration of the "estates" of the parties is intended primarily for the purpose of providing it with another guide in evaluating the earnings and earning capacity of the parties, and not for the purpose of determining capability of self-support through estate depletion. We think this is equally true in giving consideration to the estate of the alleged supporting spouse. Obviously, a determination that one is the supporting spouse because he or she can maintain the dependent spouse at the standard of living to which they were accustomed through estate depletion could soon lead to inability to provide for either party.
>
> Defendant argues that awarding alimony to this plaintiff would result in maintaining "not the wife, but her wealth." He argues that compelling the husband to build up by alimony a "treasure hoard for the wife" has been consistently rejected. Nothing in this decision is designed to allow plaintiff to increase her wealth at the expense of defendant. Under the guidelines established, plaintiff would be required to continue in expending *all* of her annual income if she desires to maintain her present standard of living. Should the wife's capital assets increase in value, through inflation, prudent investment or otherwise, and results in an increase of her income, defendant would, of course, be entitled to petition the court for modification of the alimony order under G.S. 50-16.9.

Williams v. Williams, 299 N.C. 174, 183-84, 261 S.E.2d 849, 856-57 (1980) (citations omitted).

Here, the trial court made extensive and detailed findings of fact comparing the financial circumstances of the parties, addressing all of the factors under N.C. Gen. Stat. § 50-16.3A. Relevant to Husband's argument regarding depletion of his estate, the trial court made findings comparing: (1) Husband's excessive spending, failure to pay any alimony, and voluntary increase in living expenses while still unemployed to Wife's reduction of her living expenses; (2) Husband's substantial estate even after his period of unemployment to Wife's depletion of her estate; (3) Husband's high income to Wife's much lower income; and (4) the time period of the alimony payments.

In regards to the time period of the alimony payments, the term was set as 10 years from the initial order in 2012, so Husband's obligation

will end in 2022, unless sooner modified based on future changes or terminated by Wife's remarriage or death. The trial court did have the benefit of hindsight in considering the extent to which Husband would need to deplete his estate to pay alimony over the entire ten-year term, most of which is now past. But for purposes of considering the fairness of the alimony award overall, it was proper for the trial court to take Husband's current job and earnings into account, even for prior years. As of the date of hearing, Husband was employed and now has adequate earnings to continue paying current alimony as ordered with little if any ongoing depletion of his estate; he also has the ability to pay the accrued alimony without an unreasonable depletion of his estate. In comparison, Wife has already depleted much of her estate, despite her reduction in her living expenses, and since her income is not sufficient to meet her reasonable needs, she would quickly deplete the remainder of her estate and still could not maintain herself without alimony as ordered. The trial court did not abuse its discretion by basing the alimony award on a combination of Husband's estate and his current income, recognizing that his estate would be depleted to maintain the alimony obligation during his time of unemployment, even in the absence of bad faith or imputation of income for purposes of alimony. The trial court correctly considered the comparison of the estates of the parties for purposes of modification of alimony and did not abuse its discretion in modifying alimony effective back to the date of Husband's motion to modify alimony based upon depletion of his estate.

(2) Child Support

Although depletion of Husband's estate may be a proper basis to establish the alimony obligation, the same is not necessarily true for child support. On child support, as discussed above, it appears the trial court may have used either imputation of income or averaging of income over Husband's period of unemployment. Wife argues that although the trial court could have imputed income for purposes of child support, "the Order itself also reveals that the trial court did not actually impute income for purposes of modifying [child support]." Although depletion of Husband's estate can be appropriate as to alimony, based upon the factors the trial court may consider under N.C. Gen. Stat. § 16.3A in setting alimony, those factors do not apply to child support. We cannot find any cases allowing an award of child support based solely on depletion of the payor's estate *absent* bad faith or suppression of earning capacity. Therefore, the trial court was not authorized to base the child support modification prior to Husband's new job with Ebara *solely* upon depletion of his estate, and we must remand for additional findings to clarify

whether the trial court is actually imputing income for purposes of child support, and if so, the basis for imputing income for each time period.

D. Mathematical error in alimony arrears

[3] Husband also argues that the trial court made a mathematical error in the calculation of his alimony arrears. The trial court found Husband owed 35 payments of alimony of $3,500.00 per month from June 2013 until March 2016, but alimony was reduced effective as of 1 October 2012. From October 2012 to May 2013, Husband paid eight payments of $4,500.00 per month, or $1,000.00 per month more than the modified obligation, so he actually paid $8,000.00 for which he was not given credit in the order. Wife did not respond to this argument in her brief. On remand, the trial court should correct this mathematical error and determine the correct amount of alimony arrears owed.

II. Civil Contempt

A. Application of N.C. Gen. Stat. § 5A-21

[4] Husband first argues the trial court erred as a matter of law by holding him in contempt based upon "its application of the civil contempt statute." (Original in all caps). Husband's argument is based upon N.C. Gen. Stat. § 5A-21(a) (2017):

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a)(1)-(3).

The order on appeal held Husband in contempt for his failure to pay child support and alimony "from June 2013 through March 2016," and for failure to pay the children's uninsured health care costs "through March 2016." But the same order also modified Husband's alimony obligation effective as of 1 October 2012. (His child support obligation was not modified during the time he was unemployed, although as discussed

above, it is possible that it may be modified on remand.) Therefore, the contempt period overlaps with the modification period. Husband argues that he was held in contempt of orders "that were either in whole or in part no longer in effect as of the dates for which the contempt was assessed," in violation of N.C. Gen. Stat. § 5A-21(a)(1) and (2) "because these orders did not 'remain[ ] in force' at the operative time of the supposed contempt."

Neither Husband nor Wife cites any cases directly relevant to Husband's argument that he cannot be held in contempt of a prior order simultaneously with the modification of the prior order. Of course, Husband is the party who moved to modify the prior orders asking to decrease his support obligations effective as of the date of his filing of the motion to modify. It is well-established that the trial court may modify a support obligation effective as of the date of the motion requesting modification. *See, e.g.*, *Mackins v. Mackins*, 114 N.C. App. 538, 546, 442 S.E.2d 352, 357 (1994) ("[J]ust as the trial court has the discretion to modify an alimony award as of the date the petition to modify is filed, the trial court also has the discretion to modify a child support order as of the date the petition to modify is filed.").

Husband bases his argument on the language of N.C. Gen. Stat. § 5A-21(a)(1)-(3), so we must interpret this statute. Statutory interpretation presents a question of law, which we review *de novo*:

> We review issues of statutory construction de novo. In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. Legislative purpose is first ascertained from the plain words of the statute. A statute that is clear on its face must be enforced as written. Courts, in interpreting the clear and unambiguous text of a statute, must give it its plain and definite meaning, as there is no room for judicial construction. . . .
>
> In applying the language of a statute, and because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used. Finally, we must be guided by the fundamental rule of statutory construction that statutes in pari materia, and all parts thereof, should be construed together and compared with each other.

In re Ivey, __ N.C. App. __, __, 810 S.E.2d 740, 744 (2018) (citations, quotation marks, and brackets omitted).

Under the plain words of the statute, failure to comply with an order may be contempt if "(1) The order remains in force"; and "(2) The purpose of the order may still be served by compliance with the order." N.C. Gen. Stat. § 5A-21(a)(1)-(2). Husband argues that because the trial court modified alimony obligation in the prior order effective as of the filing of his motion -- at his request – the prior order was no longer "in force" as of the date of the order holding him in contempt. *See id.* But the child support and alimony orders did not disappear, and there has been a support order "in force" continuously since the entry of the first order. *Id.* If we read subsection (1) along with subsection (2), the modification of some portions of the prior order does not necessarily render it impossible for Husband to be held in contempt for failure to pay his support obligations because the order is still "in force." *Id.* It is clear that "[t]he purpose of the order" is "still . . . served by compliance with the order." *Id.* The purpose of the order was and is to provide support for Wife and the children; even if the exact amount of the support obligation in the prior order changed, the other portions of the order were unchanged. A modification of an order effective as of a date in the past is to some extent a legal fiction; it has the legal effect of reaching back to change the past, but in reality, the past cannot change.

We must also consider the remainder of the statute along with the modifications of the order. To be held in contempt, "(2a) The noncompliance by the person to whom the order is directed [must be] willful; and "(3) The person to whom the order is directed [must be] able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order." *Id.* Depending upon the particular modification of an order, it would be possible that the noncompliance could not be considered "willful." *Id.* For example, if an order were modified to increase a support obligation, the payor could not be held in contempt for failure to pay the increased amount in the past, as that failure to pay more in the past could not be willful. Here, the trial court's modification was a reduction of alimony -- and child support remained the same -- so the prior order "remained in force" for the child support obligation and for alimony up to the newly reduced amount of $3500.00. *Id.* Had Husband failed to pay his full alimony obligation as previously ordered, $4,500.00, but did pay as much as the new reduced amount of $3,500.00, he could not be held in contempt, since in such a scenario, Husband would have paid as much as required under the modified order -- even if the motion for contempt was filed before the order was modified and he was obligated at the time to pay a greater amount.

In addition, the purpose of N.C. Gen. Stat. § 5A-21 particularly in the context of child support and alimony enforcement, could be subverted

by Husband's interpretation of the statute. Where a child support or alimony obligor has valid reason for a reduction of his obligation, he could simply file a motion to modify the support obligation and stop paying support entirely until the trial court enters an order. In the meantime, the recipient of the support could file a motion to hold him in contempt, but he may be insulated from being held in contempt, even if he paid nothing, if the order is later modified effective as of the date of his motion. Although a payor has the right to file a motion to reduce his obligation and may have that reduction effective back to the date of filing, he does not have the right to entirely avoid his support obligation until the motion is heard simply by moving for modification. *See generally Chused v. Chused*, 131 N.C. App. 668, 672-73, 508 S.E.2d 559, 562 (1998) ("A supporting parent has no authority to unilaterally modify the amount of the court ordered child support payment. The supporting parent must first apply to the trial court for modification. The trial court then has the authority to enter a modification of court ordered child support, retroactive to the filing of the petition of modification. If a person unilaterally reduces his court ordered child support payments, he subjects himself to contempt." (Citations, quotation marks, and brackets omitted)). Thus, the trial court did not err by holding Husband in contempt of the prior orders while also setting his arrears owed based upon the modified alimony obligation. Nevertheless, because we must remand for a new order addressing the modification of child support and alimony arrearages as discussed above, it is possible that the amounts of arrears and purge payments may change. We therefore must also reverse and remand the contempt order so the trial court may address whether Husband is in willful civil contempt and if so, to determine the revised amounts of arrearages owed and purge conditions in the new order.

B. Notice of acts of noncompliance

[5] Husband's second argument on contempt is that he did not have notice of the acts for which he may be held in contempt because the Motion and Show Cause Order were both filed on 31 July 2013. He argues that the Motion gave notice of alleged noncompliance only up to 31 July 2013, but the trial court held him in contempt for failure to pay child support and uninsured medical costs which accrued after that date.

Wife argues that Husband waived any argument on notice of the acts for which he may be held in contempt by failing to raise this objection at trial. We agree. Where Husband actively participated in the trial without raising any objection or argument regarding notice of the acts for which he may be held in contempt, he has waived this argument on appeal. *See Watson v. Watson*, 187 N.C. App. 55, 63, 652 S.E.2d 310, 316 (2007)

("[D]efendant did not object to the presentation of evidence on this issue at the contempt hearing. On the contrary, defendant presented evidence relating to the credit card debt, including offering exhibits. When the contemnor comes into court to answer the charges of the show cause order, she waives procedural requirements. Defendant's active participation in the hearing on this issue, without objection, defeats her contention that she was without notice that the 5 June 2006 proceeding would include a review of her failure to take responsibility for the credit card payments." (Citations, quotation marks, and brackets omitted)); *see also Byrd v. Byrd*, 62 N.C. App. 438, 443, 303 S.E.2d 205, 209 (1983) ("[W]hen issues not raised in the pleadings are tried by the express or implied consent of the parties, North Carolina allows for the pleadings to be amended to conform to the evidence. Where a party offers evidence at trial which introduces a new issue and there is no objection by the opposing party, the opposing party is viewed as having consented to the admission of the evidence and the pleadings are deemed amended to include the new issue." (Citation omitted)). In this case, Husband participated in the trial on the issues of contempt up to the date of the hearing without objecting to any of this evidence or claiming any lack of notice. Accordingly, this argument is without merit.

III. Award of Attorney Fees

[6] Finally, Husband argues that the trial court erred as a matter of law "in ordering defendant to pay plaintiff's attorney's fees as a 'combined' award and otherwise in contravention of the applicable statutes." (Original in all caps). Husband contends that because the fee award of $50,000.00 did not differentiate between the amounts awarded for each claim -- modification of child support, modification of alimony, and contempt – this Court is unable to determine Wife's entitlement to the entire award. Husband also argues that the trial court erred in awarding fees for various reasons for each claim: child support modification, alimony modification, and contempt. As explained in more detail below, if there were adequate findings to support Wife's entitlement to attorney fees on all three claims, the award would be proper, but there are a few missing pieces, so we must vacate the award and remand to the trial court for additional findings, conclusions of law, and a new order as appropriate based on those findings and conclusions.

We review the trial court's determination that Wife is entitled to an award of attorney fees based upon N.C. Gen. Stat. § 50-13.6 (2017) *de novo*, since this is a question of law, and we review the amount of the fees for abuse of discretion:

> In a custody suit or a custody *and* support suit, the trial judge, pursuant to the first sentence in G.S. 50-13.6, has the discretion to award attorney's fees to an interested party when that party is (1) acting in good faith and (2) has insufficient means to defray the expense of the suit. The facts required by the statute must be alleged and proved to support an order for attorney's fees. Whether these statutory requirements have been met is a question of law, reviewable on appeal. When the statutory requirements have been met, the amount of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion. . . .
>
> When the action is *solely* one for support, all of the requirements set forth in part III A above apply *plus* the second sentence in G.S. 50-13.6 which requires that there be an additional finding of fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. A finding of fact supported by competent evidence must be made on this issue in addition to meeting the requirements of good faith and insufficient means before attorney's fees may be awarded in a support suit. This issue is a question of law, reviewable on appeal.

Hudson v. Hudson, 299 N.C. 465, 472-73, 263 S.E.2d 719, 724 (1980) (citations, quotation marks, and brackets omitted).

Husband argues that the trial court erred as a matter of law in awarding attorney fees on all three claims. He does not challenge the amount of the award except to note that since the award is undifferentiated, it is impossible to break it down into portions awarded for each claim, so if the trial court erred in awarding fees for even one of the three claims, the award cannot stand.

A. Entitlement to fees for modification of child support

North Carolina General Statutes Section 50-13.6 sets forth the statutory requirements for an award of attorney fees in child support claims:

> *Before ordering payment of a fee in a support action*, the court must find as a fact that the party ordered to furnish support has *refused to provide support* which is

> adequate *under the circumstances existing at the time of the institution of the action or proceeding*. . . .

N.C. Gen. Stat. § 50-13.6 (emphasis added).

The trial court found: "128. [Husband] refused to provide support which is adequate under the circumstances." The trial court did not include the last portion of the finding required by N.C. Gen. Stat. § 50-13.6: "*existing at the time of the institution of the action or proceeding*." *See id.* Husband argues that the "time of the institution of the action or proceeding" was when he filed his motion to modify child support, 7 February 2012. *Id.* The circumstances existing as of February 2012 were that both Husband and Wife were unemployed *and* Husband was still paying his full child support as required by the order. Wife relies upon the definition of an "action" from Black's Law Dictionary, *see action*, Black's Law Dictionary (10th ed. 2014), to argue that "the appropriate time for measuring the adequacy of Defendant's support pursuant to [N.C. Gen. Stat.] § 50-13.6 was July 31, 2013 [when she filed a motion for contempt] through the time of trial in April 2016 . . . ." During that time period, Wife argues, Husband had "started his spending spree" and "had access to sufficient cash from his estate."

We cannot find any case which specifically defines the phrase "at the time of the institution of the action or proceeding," N.C. Gen. Stat. § 50-13.6, perhaps because this simple phrase has not been at issue in any prior case. But many cases refer to the dates when various types of actions or proceedings were *instituted*, and invariably, the cases use the date when a pleading or motion bringing a claim or seeking a particular type of relief was filed with the court as the date of the "institution of the action or proceeding." N.C. Gen. Stat. § 50-13.6; *see*, *e.g.*; *Danielson v. Cummings*, 43 N.C. App. 546, 546, 259 S.E.2d 332, 332 (1979) ("Plaintiff instituted this action on 15 February 1978 alleging he was injured by the negligence of the defendants in an automobile collision in the city of Greensboro."), *aff'd*, 300 N.C. 175, 265 S.E.2d 161 (1980). Black's Law Dictionary defines the verb "institute" as "to begin or start; commence." *See institute*, Black's Law Dictionary (10th ed. 2014). We simply cannot read the phrase "under the circumstances existing *at the time of the institution* of the action or proceeding[,]" N.C. Gen. Stat. § 50-13.6, to refer to a period of time extending from the date of a filing of a pleading to the date of the trial -- here, nearly three years, according to Wife. We must consider a particular date of filing -- but many motions have been filed in this case.

Since we are now addressing entitlement to an attorney fee award for modification of child support, not contempt, the date of the institution of the action for purposes of determining entitlement to attorney fees under N.C. Gen. Stat. § 50-13.6 is based upon the filing of Husband's motion to modify child support, not Wife's later motion for contempt. *See generally* N.C. Gen. Stat. § 50-13.6. Wife has a claim for attorney fees based upon her contempt motions as well, but the standard for that award differs from an award for modification of child support, and the contempt issue must be considered in its own right. *See*, *e.g.*, *Watson*, 187 N.C. App. at 69, 652 S.E.2d at 320 ("It is settled law in North Carolina that ordinarily attorney fees are not recoverable as an item of damages or of costs, absent express statutory authority for fixing and awarding them. Generally, attorney's fees and expert witness fees may not be taxed as costs against a party in a contempt action. However, our courts have ruled that the trial court may award attorney's fees in certain civil contempt actions." (Citations omitted)).

On child support, there is no finding as to whether Husband was providing "support which is adequate under the circumstances existing *at the time of the institution of the action or proceeding*." N.C. Gen. Stat. § 50-13.6. Wife argues that the essential facts are evident in the trial court's order and there was no conflicting evidence on this point. But the "essential fact" which is evident in the order is that in February 2012, Husband was unemployed on the date he "instituted" the proceeding by filing a motion to modify the child support obligation and he was still paying his full child support obligation. Since he was still paying his full child support obligation "at the time of the institution of the action or proceeding," he did not "refuse" to "provide support which is adequate" at that time. *Id.* He did stop paying the full child support obligation later, but that is not the question under N.C. Gen. Stat. § 50-13.6. *Id.*

This is not the end of the analysis, since Wife also filed a motion to modify child support on 13 November 2012. Wife alleged in this motion, upon information and belief, that Husband was already receiving severance pay checks from Company and also requested modifications related to the children's medical insurance coverage. But the trial court found that although Company had tendered checks to Husband, he had refused to accept these payments, since he was pursuing the lawsuit against Company seeking a greater recovery. And, as of November 2012, Husband was continuing to pay the full child support obligation under the existing order, so he was still paying adequate support at the time of institution of Wife's motion to modify child support. Therefore, the attorney fee award under N.C. Gen. Stat. § 50-13.6 could not be based upon Wife's motion to modify child support either.

The "circumstances existing" as of the dates of institution of both motions for modification of child support differed greatly from those over the following two years and at the time of trial. *Id.* The trial court therefore erred to the extent it awarded attorney fees for the modification of child support based upon N.C. Gen. Stat. § 50-13.6, since Husband was still paying his full obligation at the time of institution of both motions to modify child support. For this reason, and because the trial court awarded fees without specifying the basis, we vacate the attorney's fee award.

B. Entitlement to attorney fees on other claims

Husband also argues on the award of attorney fees that there is no way for this court to assess the "reasonableness" of the award on each claim. For example, Husband's child support obligation was increased, but his alimony obligation was decreased. In addition, the required findings for an attorney fee award for modification of alimony and contempt are not identical. We will not address these issues further, since we must vacate the attorney fee award for the reasons already discussed. On remand, the trial court should make the required findings of fact and conclusions of law for the attorney fee award on each component of the award and determine the appropriate amount of fees for each claim.

Conclusion

For the reasons stated above, we affirm in part and reverse in part and remand the trial court's order modifying alimony and child support. Because the trial court's alimony order was supported by its findings regarding depletion of the estates of the parties, we affirm the trial court's modification of alimony, both for the past and for prospective alimony. However, the trial court shall correct the mathematical error in the alimony arrears on remand. The basis for the modification of the child support from the date of Husband's motion to modify until July 2015 is unclear, so we reverse this portion of the order and on remand the trial court must clarify whether it is imputing income to Husband during each time period, the basis for imputation, the amount of income imputed, and how the child support obligation was calculated. The prospective child support order as of July 2015 is affirmed. We also conclude the trial court did not err in finding Husband in civil contempt, but because we have reversed and remanded the child support provisions of the order, we must also reverse and remand the contempt portion of the order so the trial court may enter a new order to address whether Husband is in willful civil contempt in accord with any changes to alimony arrears or child support and child support arrears owed on

remand. Finally, we reverse the order on attorney fees and remand to the trial court for entry of a new order on attorney fees setting forth the amounts of fees awarded for each component of the case, with the findings of fact and conclusions of law needed to support fees awarded for each component of the case.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Judges DILLON and INMAN concur.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY DAVID L. FRUCELLA AND MARILYN L. FRUCELLA DATED JUNE 28, 1985 AND RECORDED IN BOOK 5044 AT PAGE 764 IN THE MECKLENBURG COUNTY PUBLIC REGISTRY, NORTH CAROLINA

No. COA18-212

Filed 2 October 2018

Mortgages and Deeds of Trust—foreclosure—power of sale—lost note

The trial court properly concluded that CitiMortgage, Inc. was the holder of a note and was entitled to proceed with a power of sale foreclosure on respondents' home where affidavits of a CitiMortgage loan officer satisfied the three-part test for entitlement to enforce a lost instrument pursuant to UCC § 25-3-309.

Appeal by respondents from order entered 3 October 2017 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 September 2018.

Nelson Mullins Riley & Scarborough, L.L.P., by Donald R. Pocock, for petitioner-appellee.

Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin, for respondents-appellants.

ZACHARY, Judge.

David and Marilyn Frucella ("Respondents") appeal from a trial court's order allowing CitiMortgage, Inc. to foreclose on their home under the power of sale provision in their deed of trust, arguing that

CitiMortgage was not the holder of the Note, which was lost. We find that CitiMortgage satisfied the statutory provisions for enforcement of a lost note, and was permitted by law to enforce the Note. Therefore, we affirm the trial court's order.

Background

On 28 June 1985, Respondents executed an Adjustable Rate Note ("Note") in the amount of $191,000 for their new home on Wharton Lane in Matthews, North Carolina, naming The Lomas & Nettleton Company as lender. On that same day, Respondents executed a deed of trust on the property to secure the loan evidenced by the Note. The deed of trust contained a power of sale clause permitting the lender to sell the residence in the event the Frucellas defaulted on their obligation to pay the Note. On 5 November 1997, an instrument titled "Substitution of Trustee" was recorded, providing in part that "Crestar Bank is now the owner and holder of said Note and lien created by the foregoing Deed of Trust[.]" On 21 January 2003, another document titled "Substitution of Trustee" was recorded, providing in part that "SunTrust Bank, Inc. is now the owner and holder of said Note and lien created by the foregoing Deed of Trust."

Respondents made their last payment on the Note on 10 August 2010, bringing the loan current through June 2010. Nine months later CitiMortgage, acting as the attorney-in-fact for The Lomas & Nettleton Company, assigned the deed of trust at issue to CitiMortgage. Respondents were then given notice of their default by letter from CitiMortgage on 23 December 2010. A non-judicial foreclosure proceeding was commenced on 20 June 2011, but was dismissed without prejudice by order of the Clerk on 1 April 2013.

Another non-judicial foreclosure proceeding was commenced on 28 January 2015 and was heard before the Clerk of Superior Court of Mecklenburg County on 5 April 2017, and the Clerk entered an Order allowing the foreclosure sale. Respondents appealed to Superior Court, and this matter was heard by the Honorable Carla N. Archie on 24 August 2017. At the hearing, the trial court was presented with two lost note affidavits of April Daniels, employed by CitiMortgage as an Assistant Vice President, Assistant Officer Legal Support. One of the Daniels affidavits stated that subsequent to the execution of the Loan, the Note was transferred to CitiMortgage and that after the Loan was transferred, the original Note was lost. The other Daniels affidavit stated, *inter alia*, that: (1) "At the time CitiMortgage, Inc. lost possession of the original Note, such party had the right to enforce the Note and Deed of Trust[,]" (2) "The loss of possession of the Note is not the result of the original

Note being assigned, endorsed, or delivered to another party, cancelled, pledged, hypothecated or otherwise transferred, nor was the loss of possession the result of a lawful seizure of the Note[,]" and (3) "After a good faith, thorough and diligent manual search, the hard copy collateral file pertaining to the Loan (which pursuant to CitiMortgage, Inc.'s regular business practice would be expected to contain the original note) was not located."

On 3 October 2017, the trial court entered an order allowing the foreclosure sale. The trial court found:

> 12. After the Note and Deed of Trust were transferred to CitiMortgage, the original Note was lost. CitiMortgage offered testimony by affidavit that 1) CitiMortgage was in possession at the time the original Note was lost or destroyed; 2) after a good faith, thorough and diligent manual search, CitiMortgage was not able to locate the Note; 3) The loss of possession was not the result of the Note being assigned, endorsed, delivered to another party, cancelled, pledged, hypothecated [or] otherwise transferred.
>
> . . . .
>
> 14. The right to enforce the lost note constitutes a valid debt as described in [N.C. Gen. Stat.] § 45-21.16(d) of which CitiMortgage is the holder. . . .
>
> 15. Respondents have presented no credible evidence tending to show that any other entity is the holder of the debt or there is an actual controversy regarding CitiMortgage's status as the holder. Namely, Respondents have not shown there is another person or entity other than CitiMortgage seeking to enforce the debt. At best, Respondents presented documents tending to show there are other entities who previously had some interest or may have some interest in the outcome of these proceedings. Respondents did not present any evidence tending to show any entities are presently adverse to CitiMortgage or that Respondents are in danger of making duplicate payments.

Respondents filed timely notice of appeal.

Analysis

Respondents maintain that the trial court erred in permitting the foreclosure sale because CitiMortgage was not the holder of the Note as

required by N.C. Gen. Stat § 45-21.16(d) (2017). As explained below, we reject this argument and affirm the order of the trial court.

CitiMortgage's Authority to Seek Non-Judicial Foreclosure

When this court reviews a trial court's order permitting a foreclosure sale, where the trial court sat without a jury, "findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *In re Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013). Unchallenged findings of fact are presumed correct and binding on appeal. *In re Schipof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008). On appeal, the trial court's conclusions of law are reviewable *de novo*. *Bass*, 366 N.C. at 467, 738 S.E.2d at 175.

Our General Assembly has established a procedure to avoid lengthy and costly judicial foreclosures and instead has permitted parties to expeditiously resolve mortgage defaults via a non-judicial power of sale if authorized in the parties' mortgage or deed of trust. *See* N.C. Gen. Stat. § 45-21.16 (2017); 1 Patrick K. Hetrick and James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 13.31 (Matthew Bender, 6th Ed. 2011). This Court has explained a power of sale as follows:

> A power of sale is a contractual arrangement in a mortgage or a deed of trust which confers upon the trustee or mortgagee the power to sell the real property mortgaged without any order of court in the event of a default. A power of sale provision in a deed of trust is a means of avoiding lengthy and costly foreclosures by action, whereby the parties have agreed to abandon the traditional foreclosure by judicial action in favor of a private contractual remedy to foreclose.

In re Adams, 204 N.C. App. 318, 321, 693 S.E.2d 705, 708 (2010) (citations, internal brackets, and quotation marks omitted). This procedure provides for a hearing before the clerk of court in the county where the land is located. N.C. Gen. Stat. § 45-21.16(d) (2017). The statute strictly details the evidence the clerk can receive and the findings the clerk can make:

> Upon such hearing, *the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents*. If the clerk finds the existence of (i) *valid debt of which the party seeking*

> *to foreclose is the holder*, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A, then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article.

Id. (emphasis added). The clerk's ruling may be appealed *de novo* to a district or superior court judge having jurisdiction within ten days of the clerk's ruling. *Id.* § 45-21.16(d1).

Under the Uniform Commercial Code ("UCC"), as adopted in North Carolina, the "[h]older" of a note is defined as: "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]" *Id.* § 25-1-201(d)(21)(a). When an entity no longer possesses the note or has lost the note, it may nevertheless prove the existence of a valid debt. *See id.* §§ 25-3-301, -309(a). Section 25-3-309 of the UCC provides a three-part test of the entitlement to enforce a lost instrument:

> A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

Id. § 25-3-309(a). Both statute and case law sanction the use of affidavits as competent evidence to establish the required statutory elements in a *de novo* foreclosure hearing. *Id.* § 45-21.16(d) ("[T]he clerk shall consider the evidence of the parties and may consider . . . affidavits[.]); *In re Goddard and Petersen, PLLC*, ___ N.C. App. ___, ___, 789 S.E.2d 835, 844 (2016). *See also Emerald Portfolio, LLC v. Outer Banks/Kinnakeet*

Assocs., LLC, ___ N.C. App. ___, ___, 790 S.E.2d 721, 723 (2016) (party seeking to enforce lost note used an affidavit setting out § 25-3-309 elements to enforce a lost note).

Respondents argue that CitiMortgage cannot seek a non-judicial power of sale foreclosure because it is not the holder of the Note due to loss of the Note. This argument is without merit.

Here, applying the lost note statute, the trial court found:

> 12. After the Note and Deed of Trust were transferred to CitiMortgage, the original Note was lost. CitiMortgage offered testimony by affidavit that 1) CitiMortgage was in possession at the time the original Note was lost or destroyed; 2) after a good faith, thorough and diligent manual search, CitiMortgage was not able to locate the Note; 3) The loss of possession was not the result of the Note being assigned, endorsed, delivered to another party, cancelled, pledged, hypothecated [or] otherwise transferred.

This finding of fact tracks the required elements to establish that a party not in possession of an instrument is nonetheless entitled to enforce the instrument as set out in N.C. Gen. Stat. § 25-3-309(a) (2017). This finding is supported by the record evidence, including numerous affidavits of representatives of CitiMortgage addressing the three factors set forth in § 25-3-309(a).

Respondents further maintain that CitiMortgage "failed to present sufficient evidence that it was the holder of the Note." The attacks on the affidavits presented are tantamount to attacks on the credibility of the evidence, which we will not review. *See Sellers v. Morton*, 191 N.C. App. 75, 79, 661 S.E.2d 915, 920 (2008) ("When the trial court sits as a finder of fact, questions concerning the weight and credibility of the evidence are the province of the trial court.").

We hold that this evidence was sufficient to support the trial court's findings of fact, and that those findings of fact support the trial court's conclusion of law that the Note was enforceable by CitiMortgage under N.C. Gen. Stat. § 25-3-309. We make this holding recognizing that the Respondents presented evidence showing that other parties previously had or may have an interest in this proceeding; however, we agree with the trial court's finding that "Respondents have presented no credible evidence tending to show that any other entity is the holder of the debt or there is an actual controversy regarding CitiMortgage's status as the holder." The trial court's findings are supported by competent

evidence and are therefore conclusive "even though the evidence might sustain a finding to the contrary." *Bass*, 366 N.C. at 467, 738 S.E.2d at 175.

The trial court properly concluded that CitiMortgage was the holder in due course of a valid debt and was entitled to proceed with the power of sale foreclosure under the terms of the parties' deed of trust. Accordingly, we affirm the trial court.

AFFIRMED.

Judges STROUD and MURPHY concur.

IN THE MATTER OF I.P. AND Q.P., JR.

No. COA18-366

Filed 2 October 2018

Termination of Parental Rights—no-merit brief—no issues on appeal—independent review

Where the father's counsel in a termination of parental rights case filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d) and the father did not file a pro se brief, the Court of Appeals was bound by its decision in *In re L.V.*, 260 N.C. App. 201 (2018), to dismiss the appeal without conducting an independent review of the record, because the father failed to properly bring forth any pro se argument.

Judge ARROWOOD concurring in the result only in a separate opinion.

Chief Judge McGEE dissenting.

Appeal by Respondent-Father from orders entered 17 January 2018 by Judge P. Gwynett Hilburn in Pitt County District Court. Heard in the Court of Appeals 13 September 2018.

The Graham, Nuckolls, Conner, Law Firm, PLLC, by Timothy E. Heinle, for petitioner-appellee Pitt County Department of Social Services.

IN RE I.P.

[261 N.C. App. 638 (2018)]

Assistant Appellate Defender Joyce L. Terres, for respondent-appellant father.

Respondent-appellant father, pro se.

Administrative Office of the Courts, by Guardian Ad Litem Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

HUNTER, JR., Robert N., Judge.

Respondent-Father appeals from orders terminating his parental rights to his minor children, I.P. ("Ian") and Q.P., Jr. ("Quentin").[1] Respondent-Father's counsel filed a no-merit brief, pursuant to North Carolina Rule of Appellate Procedure 3.1(d). Respondent-Father failed to properly bring forth any *pro se* argument. We dismiss.

I. Factual and Procedural Background

On 25 June 2014, the Pitt County Department of Social Services ("DSS") obtained non-secure custody of Ian and Quentin and filed petitions alleging them to be neglected and dependent juveniles. The petition alleged the following narrative. On 11 February 2014, DSS received a child protective services ("CPS") report alleging Ian, then four months old, tested positive for cocaine and marijuana. The juvenile's mother ("mother) tested positive for cocaine and admitted to using marijuana.[2] Mother refused drug treatment. On 16 June 2014, mother had no food in her home. Although mother received $750 in food stamps per month, she sold her food stamps. Mother used "marijuana and cocaine with [Ian] in her arms and strapped to her chest[.]" Quentin ran around mother's home, holding a butcher knife. Mother "pulled a knife" on another and refused to submit to a drug screen. Mother offered Ian and Quentin's grandmother as a placement option, but CPS reported the grandmother also "ha[d] her own drug abuse issues[.]" DSS further alleged the following: (1) Ian and Quentin did not receive proper care, supervision or discipline; (2) they lived in an environment injurious to their welfare; and (3) mother was unable to provide for their care and supervision.

1. We use pseudonyms throughout the opinion for ease of reading and to protect the juveniles' identities. N.C. R. App. P. 3.1(b) (2017).

2. Mother is not a party to this appeal. In the interest of brevity, this opinion omits most of the background relevant to mother.

At the time DSS filed the petitions, Respondent-Father's whereabouts were unknown.[3]

On 7 August 2014, the trial court held an adjudication hearing, which Respondent-Father attended. On 29 August 2014, the court entered an adjudication order. The court concluded Ian and Quentin were neglected and dependent juveniles.[4] Following a disposition hearing on 4 September 2014, the court entered an order on 8 October 2014. The court kept custody of Ian and Quentin with DSS and granted Respondent-Father visitation with the juveniles. The trial court further ordered Respondent-Father to do the following: (1) comply with the terms of his probation and not acquire new criminal charges; (2) complete parenting classes; (3) obtain and maintain stable employment; and (4) obtain and maintain stable housing.

On 29 January 2015, the trial court held a permanency planning review hearing. In an order entered 5 March 2015, the court found:

> 19. The Department has only had contact with the Respondent Father once since the initiation of this case. The Respondent Father is currently incarcerated. His release date is unknown.
>
> 20. Reunification efforts would not result in placement in the home within a reasonable period of time [and] would be futile and inconsistent with safety and the need for a safe permanent home for the following reasons: the Respondent Father has not been involved in the Juvenile[s'] case and has failed to show a lack [of] dedication to the Juveniles. He is currently incarcerated and his release date is unknown.

Consequently, the trial court ceased reunification efforts with Respondent-Father. The court allowed Respondent-Father's counsel to withdraw from representation, because Respondent-Father failed to stay in contact with counsel. The court set the permanent plan for Ian and Quentin as reunification with mother, with a concurrent plan of adoption.

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3. At the termination hearing, a DSS social worker testified Respondent-Father "surface[d] . . . a month and a half later."

4. The trial court's adjudication order and subsequent orders prior to the filing of petitions to terminate parental rights also involved Ian and Quentin's siblings, but they are not parties to this appeal.

The court held another review hearing on 28 January 2016.[5] In an order entered 12 February 2016, the court found mother relapsed and used marijuana and cocaine. The court ceased reunification efforts with mother. The court changed the primary permanent plan to adoption, and the secondary plan to guardianship. The court held another review hearing on 10 November 2016. At the hearing, the trial court found paternity testing ruled Respondent-Father out as Ian's biological father.

On 5 December 2016, DSS filed a petition to terminate mother's parental rights to Ian. The same day, DSS filed a petition to terminate mother's and Respondent-Father's parental rights to Quentin.[6] DSS alleged the following grounds for termination existed as to Quentin: (1) neglect; (2) failure to correct the conditions which led to Quentin's removal from his care; (3) failure to pay for Quentin's cost of care while Quentin was in DSS custody; (4) dependency; and (5) willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (6)-(7) (2017).

The trial court held a hearing on the petitions on 28 September 2017 and 7 December 2017.[7] DSS called Kelli Clay, a social worker. Due to Respondent-Father's probation conditions, DSS set up a "strict visitation plan" for him. Respondent-Father did not comply with the visitation plan. Out of twenty-five opportunities for visitation, Respondent-Father attended thirteen. Respondent-Father last visited with the juveniles on 11 July 2016. Respondent-Father owed $1,270.18 in arrears for child support for Quentin. Respondent-Father did give the juveniles a few gifts, "but nothing substantial[.]"

Although the court ordered Respondent-Father to not obtain any new criminal charges, authorities in North Carolina charged him for crimes "that involved communicating threats[.]" Additionally, Respondent-Father did not complete parenting classes. Although Respondent-Father told DSS he obtained employment and stable housing, he failed to provide any verification.

DSS moved to amend the petition to terminate parental rights to Ian to include allegations against Respondent-Father. DSS contended it learned Respondent-Father had been found to be the father of Ian in a

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5. The court also held review hearings on 30 April 2015 and 16 July 2015.

6. Because paternity tests established Respondent-Father was not the biological father of Ian, DSS did not seek to terminate Respondent-Father's paternal rights to Ian.

7. The hearing was for the petitions to terminate mother's parental rights to Ian and Quentin and Respondent-Father's parental rights to Quentin.

prior child-support hearing and that court ordered Respondent-Father to pay child support for Ian. Thus, Respondent-Father is Ian's legal father. With the consent of Respondent-Father's counsel, who joined in the motion, the court allowed the requested amendments so the allegations against Respondent-Father as to Ian were identical to those in the petition to terminate Respondent-Father's parental rights to Quentin.

Respondent-Father testified on his own behalf and largely narrated his testimony. From 2013 until the hearing, Respondent-Father was intermittently incarcerated. In February 2016, Respondent-Father returned to North Carolina. He began working at Cracker Barrel and moved into an apartment in Greenville. Respondent-Father "look[ed] for parenting classes to take, but . . . was unfortunate enough to not find any classes." Respondent-Father alleged DSS fought against him getting custody of Ian and Quentin.

On 17 January 2018, the trial court entered orders terminating Respondent-Father's parental rights to Ian and Quentin. The court found the following grounds for termination existed: (1) neglect; (2) failure to correct the conditions which led to the juveniles' removal from his care; (3) failure to pay for the juveniles' cost of care while they were in DSS custody; (4) dependency; and (5) willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (6)-(7). In an order entered 17 January 2018, the court found termination of Respondent-Father's parental rights was in the juveniles' best interests. On 30 January 2018, Respondent-Father filed timely notice of appeal.

II. Analysis

Appellate counsel for Respondent-Father filed a no-merit brief on Respondent-Father's behalf, in which counsel states she made a conscientious and thorough review of the record on appeal and concluded there is no issue of merit on which to base an argument for relief. Pursuant to North Carolina Rule of Appellate Procedure 3.1(d), counsel requests this Court conduct an independent examination of the case. N.C. R. App. P. 3.1(d) (2017). In accordance with Rule 3.1(d), counsel wrote a letter to Respondent-Father on 2 May 2018, advising him of counsel's inability to find error, her request for this Court to conduct an independent review of the record, and his right to file his own arguments directly with this Court. Counsel also avers she provided Respondent-Father with copies of all relevant documents so that he may file his own arguments with this Court.

In addition to seeking review pursuant to Rule 3.1(d), counsel directs this Court's attention to potential issues with the trial court's

conclusions of law on the grounds of failure to correct the conditions which led to the juveniles' removal from his care, failure to pay for the juveniles' cost of care while they were placed in DSS custody, dependency, and willful abandonment. Counsel concedes, however, the trial court did not err in terminating Respondent-Father's parental rights on the ground of neglect. *See In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004) (citation omitted) ("Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground[s] . . . found by the trial court"). Counsel also concedes the trial court did not abuse its discretion in concluding termination of Respondent-Father's parental rights was in the juveniles' best interests.

On 9 May 2018, counsel filed a motion, requesting this Court extend Respondent-Father's time to file a *pro se* brief. In an order entered 11 May 2018, we granted this motion, ordering Respondent-Father to file his brief by 8 June 2018.

On 18 June 2018, Respondent-Father filed his *pro se* brief, arguing:

> the trial court[']s fact finding was flawed because it was influenced by specious testimony & acts. I am not able to prove my case in chief at this exact moment as I do not have access to vital paperwork/documents nor the resources to support my argument. Currently, I am being detained at the address listed on criminal charges, with a trial date set within the next 90 days. I humbly request that this court suspend any final ruling for the next 120 days. That will give my criminal case time to have been heard & me to compile & obtain what[']s needed to support my argument.

Inasmuch as Respondent-Father's argument presents a request to hold his appeal in abeyance, we deny the request. Moreover, Respondent-Father's sole argument on appeal—the trial court's fact finding was flawed—is a bare assertion of error unsupported by citation to any record evidence or legal authority, and it is thus not properly before this Court. *In re C.D.A.W.*, 175 N.C. App. 680, 688, 625 S.E.2d 139, 144 (2006) (holding an issue on appeal was abandoned where it was "void of any discernible argument or citation as authority for such a claim"). *See also* N.C. R. App. P. 28(b)(6) (2017) ("Issues . . . in support of which no reason or argument is stated, will be taken as abandoned.").

Although Respondent-Father filed *pro se* arguments with this Court, his arguments are not properly before this Court because they are

untimely and nothing more than unsupported allegations of error, as explained *supra*. Thus, "[n]o issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure." *In re L.V.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2018 WL 3232738 (N.C. Ct. App. July 3, 2018). Accordingly, we must dismiss Respondent-Father's appeal. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

III. Conclusion

For the foregoing reasons, we dismiss Respondent-Father's appeal.

DISMISSED.

Judge ARROWOOD concurs in result only in a separate opinion.

Chief Judge McGEE dissents in a separate opinion.

ARROWOOD, Judge, concurring in result only.

I concur in result only for the reasons discussed in my concurrence in *In the Matter of: L.E.M.*, __ N.C. App. __, __ S.E.2d __, (2018) (No. COA18-380), filed concurrently with this opinion.

McGEE, Chief Judge, dissenting.

I dissent for the reasons discussed in my dissenting opinion in *In re L.E.M.*, __ N.C. App. __, __ S.E.2d __, (2018) (No. COA-380), filed concurrently with this opinion.

IN RE L.E.M.

[261 N.C. App. 645 (2018)]

IN THE MATTER OF L.E.M.

No. COA18-380

Filed 2 October 2018

Termination of Parental Rights—no-merit brief—no issues on appeal—independent review

Where the father's counsel in a termination of parental rights case filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d) and the father did not file a pro se brief, the Court of Appeals was bound by its decision in *In re L.V.*, 260 N.C. App. 201 (2018), to dismiss the appeal without conducting an independent review of the record, because the father failed to argue or preserve any issues for review.

Judge ARROWOOD concurring in the result only in a separate opinion.

Chief Judge McGEE dissenting.

Appeal by Respondent-Father from order entered 5 January 2018 by Judge John K. Greenlee in Gaston County District Court. Heard in the Court of Appeals 23 August 2018.

Elizabeth Myrick Boone for petitioner-appellee Gaston County Department of Social Services.

Assistant Appellate Defender Annick Lenoir-Peek for respondent-appellant father.

Nelson Mullins Riley & Scarborough LLP, by Reed J. Hollander, for guardian ad litem.

HUNTER, JR., Robert N., Judge.

Respondent appeals from an order terminating his parental rights to his minor child, L.E.M. ("Landon").[1] Respondent's counsel filed a no-merit brief, pursuant to North Carolina Rule of Appellate Procedure 3.1(d). We dismiss.

1. We use pseudonyms throughout the opinion for ease of reading and to protect the juveniles' identities.

I. Factual and Procedural Background

On 4 January 2016, the Gaston County Department of Social Services ("DSS") obtained non-secure custody of Landon and his older sibling B.E.M. ("Brett") and filed a petition alleging both to be neglected and dependent juveniles.[2] DSS alleged it was involved with the family since September 2015, due to allegations of substance abuse and medical neglect of Brett. Following a recent arrest, both parents[3] were being held in the Gaston County Jail. DSS further alleged the following: (1) the children did not receive proper care, supervision, or discipline from their parents; (2) the children lived in an environment injurious to their welfare; and (3) the parents were unable to provide for the children's care and supervision.

On 17 February 2016, Respondent entered into a mediation agreement with DSS, wherein he accepted Landon would be adjudicated as neglected and dependent, entered into a case plan with DSS, and agreed to work with DSS toward reunification with Landon. On 19 April 2016, the trial court entered an order adjudicating Landon as a neglected and dependent juvenile. The court continued custody of Landon with DSS. The court ordered Respondent comply with the terms of his mediated case plan, including: (1) obtain a substance abuse assessment, follow recommendations of the assessment, and submit to random drug screens; (2) obtain a mental health assessment and follow recommendations of the assessment; (3) attend the juveniles' medical appointments; (4) obtain safe and appropriate housing; (5) obtain employment; and (6) complete a parenting class and utilize skills learned during visits with Landon.

In May and September 2016, the trial court conducted review and permanency planning hearings. The court established Landon's primary permanent plan as reunification, with guardianship as the secondary plan.

On 29 November 2016, the court held another review and permanency planning hearing. In an order entered 28 March 2017, the trial court found Respondent failed to make sufficient progress on his case plan and was incarcerated in West Virginia. The court changed Landon's primary permanent plan to adoption, with a secondary plan of reunification In an order entered 11 April 2017, the court continued Landon's primary permanent plan as adoption, but changed the secondary plan to guardianship.

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2. Respondent is not the father of Brett, and Brett is not a party to this appeal.

3. The juveniles' mother is not a party to this appeal.

On 12 April 2017, DSS filed a petition to terminate Respondent's parental rights to Landon. DSS alleged grounds existed for termination of Respondent's parental rights based on: (1) neglect; (2) failure to correct the conditions that led to Landon's removal from his care; and (3) dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(2), (6) (2017).

On 13 November 2017, the trial court held a termination of parental rights hearing. DSS called Respondent. Respondent entered into a case plan with DSS, following Landon's adjudication as a neglected and dependent juvenile. Pursuant to the plan, Respondent agreed to resolve substance abuse issues, attend counseling, attend parenting classes, and visit Landon. However, he failed to participate in a substance abuse assessment or complete any substance abuse treatment.

In June 2015, authorities in Harrison County arrested Respondent for a parole violation. On 1 August 2015, authorities "shipped" him to jail in West Virginia. In West Virginia, he did not complete any progress on his case plan, because "[t]hey don't provide that stuff in the West Virginia department."

While Respondent was incarcerated, Hannah Crawford, a DSS social worker regularly contacted Respondent. He wrote her one letter in December 2015. In his letter, he did not tell Crawford about the lack of resources available to him. Following his release in late May or early June 2017, the court and DSS refused to allow him to see Landon and Brett.[4]

DSS next called Hannah Crawford. From the time DSS took custody of Landon on 4 January 2016 to the date of the hearing, Crawford was the social worker assigned to Landon's case. Crawford asserted Respondent failed to make "significant progress" on his case plan, even prior to his incarceration on 1 June 2015. Respondent attended visitation with Landon but did not demonstrate "appropriate" parenting skills. Respondent failed to obtain a substance abuse assessment, engage in any substance abuse treatment, or obtain a mental health assessment. Respondent also did not complete parenting classes, obtain employment, or obtain safe housing. On 26 May 2016, a doctor performed a parental capacity evaluation, concluding Respondent possessed "rather marginal parenting capability."

Following another arrest in June 2016 and Respondent's incarceration until May 2017, Crawford "attempted" to maintain contact

4. DSS presented Respondent with a June 2017 court order, stating it would "reinstat[e] respondent father's visitation provided he is able to provide a clean drug screen."

with Respondent. Respondent did not contact Crawford "regularly", inquire about Landon's placement, or send any "cards, gifts, letters . . . ." Respondent replied to Crawford only once, in December 2016, acknowledging the case plan Crawford sent to him and that he received her letters. In the letter, it seemed "along the line that he'd be able to complete parenting classes[.]"

Following his subsequent release in April 2017, Respondent called Crawford in May 2017.[5] Crawford asked Respondent to meet with DSS to go over the case plan. DSS and Respondent met on 5 June 2017. Following the meeting, Respondent failed to attend a mental health assessment, failed to obtain a substance abuse assessment, did not comply with two drug screens, and tested positive for drugs.

Since 31 May 2016, Respondent did not write or call Crawford to ask about Landon or have any contact with Landon. As of the day of the hearing, Respondent failed to submit proof of stable employment or appropriate housing.

On 5 January 2018, the trial court entered an order terminating Respondent's parental rights on the grounds of neglect and failure to make reasonable progress. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2). The court concluded termination of Respondent's parental rights was in Landon's best interests. Respondent filed timely notice of appeal.

II. Analysis

Appellate counsel for Respondent filed a no-merit brief on Respondent's behalf in which counsel states she made a conscientious and thorough review of the record on appeal and concluded there is no issue of merit on which to base an argument for relief. Pursuant to North Carolina Rule of Appellate Procedure 3.1(d), appellate counsel requests this Court conduct an independent examination of the case. N.C. R. App. P. 3.1(d) (2017). In accordance with Rule 3.1(d), counsel wrote a letter to Respondent on 26 April 2018, advising Respondent of counsel's inability to find error, of counsel's request for this Court to conduct an independent review of the record, and of Respondent's right to file his own arguments directly with this Court. Counsel also avers she provided Respondent with copies of all relevant documents so that he may file his own arguments with this Court. Respondent did not file written arguments with this Court, and a reasonable time for him to have done so

5. The date of Respondent's release is not clear from the testimony; however, the trial court found as fact the West Virginia Department of Corrections released Respondent in May 2017.

has passed. Thus, "[n]o issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure." *In re L.V.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, 2018 WL 3232738 (N.C. Ct. App. July 3, 2018). Accordingly, we must dismiss Respondent's appeal. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citation omitted) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

III. Conclusion

For the foregoing reasons, we dismiss Respondent's appeal.

DISMISSED.

Judge ARROWOOD concurs in result only in separate opinion.

Chief Judge McGEE dissents in a separate opinion.

ARROWOOD, Judge, concurring in result only.

We are dismissing respondent's appeal because we are bound by *In re L.V.*, __ N.C. App. __, 814 S.E.2d 928, 2018 WL 3232738 (N.C. Ct. App. July 3, 2018). I agree that *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989) requires our Court to follow *In re L.V.*, however, I concur in the result only because I believe *In re L.V.* erroneously altered the jurisprudence of cases arising under Rule 3.1 of the North Carolina Rules of Appellate Procedure. Furthermore, this change significantly impacts the constitutional rights of North Carolinians, such as the respondent in this case, whose fundamental right to a parental relationship with his child should only be terminated as contemplated by law. Therefore, I write separately to address this shift in our precedent.

The concept of a no-merit brief, also referred to as an *Anders* brief, comes from the United States Supreme Court's decision in *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967). *Anders* held that an attorney representing a criminal defendant in a case the attorney finds without legal merit can request permission to withdraw as counsel for this reason, but the request must "be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498. "[T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.*

Our Court initially denied extending *Anders* procedures to termination of parental rights cases. *See In re N.B.*, 183 N.C. App. 114, 117, 644 S.E.2d 22, 24 (2007) (citation omitted). However, the *In re N.B.* court "urge[d] our Supreme Court or the General Assembly to reconsider this issue[,]" noting that "permitting such review furthers the stated purposes of our juvenile code." *Id.* at 117-19, 644 S.E.2d at 24-25. Thereafter, our Supreme Court adopted Rule 3.1(d) of the North Carolina Rules of Appellate Procedure, which states:

> In an appeal taken pursuant to [N.C. Gen. Stat.] § 7B-1001, if, after a conscientious and thorough review of the record on appeal, appellate counsel concludes that the record contains no issue of merit on which to base an argument for relief and that the appeal would be frivolous, counsel may file a no-merit brief. In the brief, counsel shall identify any issues in the record on appeal that might arguably support the appeal and shall state why those issues lack merit or would not alter the ultimate result. Counsel shall provide the appellant with a copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. Counsel shall also advise the appellant in writing that the appellant has the option of filing a *pro se* brief within thirty days of the date of the filing of the no-merit brief and shall attach to the brief evidence of compliance with this subsection.

N.C.R. App. P. 3.1(d) (2018).

Rule 3.1(d) provides for the filing of "no-merit briefs" and allowing an *Anders*-like procedure for appeals taken pursuant to N.C. Gen. Stat. § 7B-1001, including from termination of parent rights orders. *See id.* A parent may file a *pro se* brief when counsel files a no-merit brief, but nothing in the rule appears to require a parent to file a *pro se* brief in order for our Court to review the appeal. *See id.* Indeed, our Court has consistently interpreted Rule 3.1(d) to require our Court to conduct an independent review in termination of parental rights cases in which counsel filed a no-merit brief and the respondent-parent did not file a *pro se* brief. *See, e.g.*, *In re A.A.S.*, __ N.C. App. __, __, 812 S.E.2d 875, 879 (2018); *In re M.S.*, 247 N.C. App. 89, 94, 785 S.E.2d 590, 594 (2016); *In re D.M.G.*, 235 N.C. App. 217, 763 S.E.2d 339, 2014 WL 3511008 at *1, slip op. at *3 (2014) (unpublished); *In re D.M.H.*, 234 N.C. App. 477, 762 S.E.2d 531, 2014 WL 2795916 at *1, slip op. at *2 (2014) (unpublished); *In re O.M.B.*, 204 N.C. App. 369, 696 S.E.2d 201, 2010 WL 2163793 at

*1, slip op. at *3 (2010) (unpublished); *In re R.A.M.*, 228 N.C. App. 568, 749 S.E.2d 110, 2013 WL 4005847 at *1-2, slip op. at *3-6 (2013) (unpublished); *In re P.R.B., Jr., III*, 204 N.C. App. 595, 696 S.E.2d 925, 2010 WL 2367236 at *5, slip op. at *10-11 (2010) (unpublished); *In re S.N.W.*, 207 N.C. App. 377, 699 S.E.2d 685, 2010 WL 3860906 at *1-2, slip op. at *3-5 (2010) (unpublished).

In re L.V. disavowed this routine procedure, and signaled a significant shift in our jurisprudence of cases arising under Rule 3.1 of the North Carolina Rules of Appellate Procedure. In *In re L.V.*, our Court held for the first time that "[n]o issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure" when a respondent's appellate counsel files a no-merit brief that complied with Rule 3.1(d) and respondent fails to "exercise her right under Rule 3.1(d) to file a *pro se* brief." *Id.* at __, 814 S.E.2d at 928-29, slip op. at *2. To support its decision, the *In re L.V.* court cites Judge Dillon's recent concurrence in *State v. Velasquez-Cardenas*, __ N.C. App. __, 815 S.E.2d 9 (2018) (Dillon, J., concurring): "Rule 3.1(d) does *not* explicitly grant indigent parents the right to receive an *Anders*-type review of the record by our Court, which would allow our Court to consider issues not explicitly raised on appeal." *Velasquez-Cardenas*, __ N.C. App. at __, 815 S.E.2d at 20 (italics in original). I note that a concurring opinion is not binding on our Court, and also that the cited quotation was dicta, and therefore not controlling authority. *See Trustees of Rowan Tech. College v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.") (citations omitted). The *In re L.V.* court did not address our Court's previous case law, which consistently conducted an *Anders* review of the record when appellate counsel complies with Rule 3.1(d), even if the appellant does not exercise her right under Rule 3.1(d) to file a *pro se* brief.

I believe that *In re L.V.*'s interpretation of Rule 3.1(d) affects parents' interest in the accuracy and justice of a decision to terminate their parental rights, and is inconsistent with the purposes of our juvenile code. *See Little v. Little*, 127 N.C. App. 191, 192, 487 S.E.2d 823, 824 (1997) ("A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one.") (citation, quotation marks, and alteration omitted). Therefore, I believe *In re L.V.* is an anomaly in our case law that must be corrected to ensure that the fundamental right to a parental relationship is not terminated other than as permitted by law. However, I concur in the result only because *In re Civil Penalty* requires me to follow the divergent path that the Court has taken. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

McGEE, Chief Judge, dissenting.

I respectfully dissent from the majority opinion's holding that this Court, pursuant to *In re L.V.*, __ N.C. App. __, 814 S.E.2d 928 (2018), must dismiss Respondent's Rule 3.1(d) appeal. I agree with the analysis of the *concurring* opinion, and adopt that analysis, excepting its ultimate conclusion that we are bound by *In re L.V.*, and must therefore dismiss Respondent's appeal. I agree with the concurring opinion that *In re L.V.* was not correctly decided. As noted by both the majority and concurring opinions, we would normally be bound by *In re L.V.*; however, I believe the holding in *In re L.V.* is contrary to settled law from prior opinions of this Court. Therefore, this Court in *In re L.V.* was without the authority to "overrule" the prior opinions of this Court, and those prior opinions remain controlling in the present matter.

As the concurring opinion notes, "our Court has consistently interpreted Rule 3.1(d) to require our Court to conduct an independent review in termination of parental rights cases in which counsel filed a no-merit brief and the respondent-parent did not file a *pro se* brief." I also agree that "*In re L.V.* is an anomaly in our case law[.]" Rule 3.1(d) does not require a parent to file a *pro se* brief.

Rule 3.1(d) states:

> *No-Merit Briefs*. In an appeal taken pursuant to N.C.G.S. § 7B-1001, if, after a conscientious and thorough review of the record on appeal, appellate counsel concludes that the record contains no issue of merit on which to base an argument for relief and that the appeal would be frivolous, counsel may file a no-merit brief. In the brief, counsel shall identify any issues in the record on appeal that might arguably support the appeal and shall state why those issues lack merit or would not alter the ultimate result. Counsel shall provide the appellant with a copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. *Counsel shall also advise the appellant* in writing that the appellant *has the option* of filing a pro se brief within thirty days of the date of the filing of the no-merit brief and shall attach to the brief evidence of compliance with this subsection.

N.C. R. App. P. 3.1(d) (emphasis added).

In *In re L.V.*, this Court dismissed Respondent's no-merit appeal based on the following reasoning:

> Respondent appeals from orders terminating her parental rights to the minor children L.V. and A.V. On appeal, Respondent's appellate counsel filed a no-merit brief pursuant to Rule 3.1(d) stating that, after a conscientious and thorough review of the record on appeal, he has concluded that the record contains no issue of merit on which to base an argument for relief.[1] N.C. R. App. P. 3.1(d). Respondent's counsel complied with all requirements of Rule 3.1(d), and Respondent did not exercise her right under Rule 3.1(d) to file a *pro se* brief. No issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure.[2]

In re L.V., __ N.C. App. at __, 814 S.E.2d at 928-29 (footnotes in original).[3]

The majority opinion holds that we are bound by *In re L.V.* and must dismiss Respondent's appeal. However, this Court has continually conducted the *Anders*-type review provided for in Rule 3.1(d), absent any accompanying *pro se* briefs from the respondents, both before and after *In re L.V.* was filed on 3 July 2018.[4] Rule 3.1(d) *requires* a respondent's counsel who appeals pursuant to Rule 3.1(d) to file an appellate brief, which must include issues identified by counsel "that might arguably support the appeal and [counsel] shall state [in the no-merit brief] why those issues lack merit or would not alter the ultimate result." N.C. R. App. P. 3.1(d). Though not explicitly stated in Rule 3.1(d), it seems clear that the purpose in allowing attorneys to file no-merit briefs is to allow a respondent's counsel to request review by this Court of the respondent's record for potential error even though *counsel* has not been able to identify any error *counsel* believes warrants relief on appeal. Pursuant to

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1. "In accordance with Rule 3.1(d), appellate counsel provided Respondent with copies of the no-merit brief, trial transcript, and record on appeal and advised her of her right to file a brief with this Court *pro se* on 11 April 2018."

2. " 'Rule 3.1(d) does *not* explicitly grant indigent parents the right to receive an *Anders*-type review of the record by our Court, which would allow our Court to consider issues not explicitly raised on appeal.' *State v. Velasquez-Cardenas*, ___N.C. App. ___, ___, 815 S.E.2d 9, 20 (2018) (Dillon, J., concurring)."

3. I join the concurring opinion in pointing out that the sole "authority" cited by *In re L.V.* is *dicta* obtained from a concurring opinion in a criminal matter, devoid of precedential value. The holding of *In re L.V.* is therefore supported by no legal authority.

4. *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967).

the reasoning implicit in *In re L.V.*, the actual no-merit brief required to be filed by a respondent's counsel *is itself unreviewable* – i.e. appellate counsel's request to this Court to conduct the review as argued in the no-merit brief does not constitute an issue preserved for appellate review. This Court considered the same reasoning in *Velasquez-Cardenas*, where we *rejected* the *dicta* now relied upon in *In re L.V.*:

> In the present matter, the concurring opinion, relying on N.C. R. App. P. 28, argues that we should not address the *Anders* issue in this opinion because it was not first brought up and argued in Defendant's brief. *We believe the fact that Defendant's attorney filed an Anders brief is sufficient to raise the issue and present it for appellate review.*

Velasquez-Cardenas, __ N.C. App. at __, 815 S.E.2d at 18 (some emphasis added); *see also State v. Chance*, 347 N.C. 566, 568, 495 S.E.2d 355, 356 (1998) (Finding "no error" because "[i]n accordance with our duty under *Anders*, we have examined the record and the transcript of the trial. From this examination, we find the appeal to be wholly frivolous."). Because the defendant in *Velasquez-Cardenas* did not have any constitutional right to *Anders* review, the question of whether an *Anders*-type brief preserved any issues for appellate review had to be decided. This Court rejected the reasoning of the concurring opinion, and held that the brief requesting *Anders*-type review did present appropriate issues for appellate review, Rule 28(b)(6) notwithstanding. *Id.* In *Velasquez-Cardenas* we also factored into our analysis that this Court had a long, uninterrupted history of conducting full *Anders*-type review from denials of motions requesting post-conviction DNA testing, and our authority to conduct that review had never before been questioned. *Id.* at __, 815 S.E.2d at 11–12. In part of the analysis, this Court also recognized that review pursuant to Rule 3.1(d) was an *Anders*-type review: "Our Supreme Court added a provision to our Rules of Appellate Procedure, effective for all cases appealed after 1 October 2009, allowing an *Anders*-like procedure for appeals taken pursuant to N.C. Gen. Stat. § 7B-1001, including from TPR orders. N.C. R. App. P. 3.1(d)." *Id.* at __, 815 S.E.2d at 16.

However, if we follow *In re L.V.*, upon a Rule 3.1(d) appeal, this Court will be limited to review of *only* those issues included in a respondent's *pro se* brief – should respondent chose to file one.[5] Nothing prior to the adoption of Rule 3.1(d) prevented a respondent from filing a *pro*

5. As noted below, since the adoption of Rule 3.1(d) only *a single respondent* has chosen to file any sort of *pro se* response.

se appeal. Therefore, assuming the holding in *In re L.V.* to be correct, I do not see how the adoption of Rule 3.1(d) has *materially* benefitted respondents, or expanded the scope of appellate review, in any manner.[6]

The majority opinion in this case holds, based upon *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted) ("[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court"), that we are bound by *In re L.V.* The concurring opinion agrees. I agree that *In re Civil Penalty* controls the outcome, but would reach a different result. In *In re Civil Penalty*, our Supreme Court reasoned and held as follows:

> This Court has held that one panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case. The situation is different here since this case and *N.C. Private Protective Services Board v. Gray*, do not arise from the same facts. In *Virginia Carolina Builders*, however, we indicated that the Court will examine *the effect of the subsequent decision, rather than whether the term "overrule" was actually employed*. We conclude that the *effect* of the majority's decision here was to overrule [a prior opinion of the Court of Appeals]. This it may not do. Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.
>
> We hold . . . that a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.

Id. at 384, 379 S.E.2d at 36–37 (citations omitted) (emphasis added).[7] As this Court held in a recent opinion affirming the termination of a father's parental rights: "To the extent that *J.C.* is in conflict with prior holdings of this Court, . . . we are bound by the prior holdings." *In re O.D.S.*, __

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6. Respondents perhaps receive some benefit by their attorney's work in compiling and filing the record, and by performing some other ministerial actions.

7. The 2016 amendment of N.C. Gen. Stat. § 7A-16 created a procedure for *en banc* review by this Court of its own decisions, but *In re Civil Penalty* is still the law with respect to the decisions of three judge panels of this Court.

N.C. App. __, __, 786 S.E.2d 410, 417, *disc. review denied*, 369 N.C. 43, 792 S.E.2d 504 (2016). "[P]recisely because of *In re Civil Penalty*, when there are conflicting lines of opinions from this Court, we generally look to our earliest relevant opinion in order to resolve the conflict." *State v. Meadows*, __ N.C. App. __, __, 806 S.E.2d 682, 693 (2017), *disc. review allowed*, __ N.C. __, 812 S.E.2d 847 (2018).; *see also State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004); *State v. Alonzo*, __ N.C. App. __, __, __ S.E.2d __, __, 2018 WL 3977546, *2 (2018) (this Court is bound to follow an earlier decision of this Court, not a later decision that is in conflict with the earlier decision); *Boyd v. Robeson Cty.*, 169 N.C. App. 460, 470 and 477, 621 S.E.2d 1, 7 and 12 (2005) (citation omitted) (certain of this Court's "decisions . . . effectively overrule [a prior decision of this Court]. It is, however, axiomatic that an appellate panel may not interpret North Carolina law in a manner that overrules a decision reached by another panel in an earlier opinion." Therefore, we held that the later opinion was without precedential effect.).

The change proposed by *In re L.V.* can only be adopted if this Court rejects nearly a decade of appellate practice and precedent set following the 2009 enactment of Rule 3.1(d) by our Supreme Court. I believe the "effect" of the holding in *In re L.V.* is to overrule the precedent set by the prior opinions of this Court, which it cannot do. *In re O.D.S.*, __ N.C. App. at __, 786 S.E.2d at 417. Since the enactment of Rule 3.1(d), I have been able to locate seventy-six opinions, published and unpublished, filed prior to *In re L.V.*, in which one or both respondent-parents' counsel have sought review pursuant to the no-merit provisions of Rule 3.1(d). One of those opinions was dismissed because no proper notice of appeal was filed. *In re D.L.M.*, 208 N.C. App. 281, 702 S.E.2d 555, 2010 WL 5135556, *2–3 (2010) (unpublished). Of the remaining seventy-five opinions involving no-merit appeals, unsurprisingly, only three are published.[8] *In re A.A.S.*, __ N.C. App. __, __, 812 S.E.2d 875, 879 (2018); *In re M.J.S.M.*, __ N.C. App. __, __, 810 S.E.2d 370, 374–75 (2018); and *In re M.S.*, 247 N.C. App. 89, 94, 785 S.E.2d 590, 593–94 (2016).

This Court conducted full *Anders*-type reviews pursuant to Rule 3.1(d) in all seventy-five appeals it decided prior to *In re L.V.* In only *one* out of the seventy-five appeals – *In re A.L.W.* – did the respondent-parent exercise "the option of filing a pro se brief" as allowed by Rule 3.1(d). N.C. R. App. P. 3.1(d); *In re A.L.W.*, __ N.C. App. __, 803 S.E.2d 665 (2017) (unpublished) ("Respondent-mother filed *pro se* arguments

8. By definition, no-merit appeals are likely to be decided without great difficulty, and are unlikely to include novel issues of law.

with this Court challenging the trial court's decision to terminate her rights. Her *pro se* brief, however, contains no 'citations of the authorities upon which the appellant relies,' N.C. R. App. P. 28(b)(6), and provides no basis to disturb the trial court's orders."). Nonetheless, this Court in *In re A.L.W. still* conducted the full Rule 3.1(d) *Anders*-type review based upon the respondent's attorney's no-merit brief. *Id*. In the remaining seventy-four opinions, this Court conducted a full *Anders*-type no-merit review pursuant to Rule 3.1(d) even though *none* of the respondents in those appeals filed *pro se* briefs to accompany their attorneys' no-merit briefs.[9] I cannot find any case prior to *In re L.V.* in which this Court indicated any necessity that a respondent-parent file a *pro se* brief in order to activate this Court's jurisdiction or authority to consider the no-merit brief filed by the respondent's attorney. *Following* the filing of *In re L.V.*, this Court has conducted full *Anders*-type review, absent any *pro se* filings from the respondents, in four out of the five appeals it has decided. Out of eighty opinions filed by this Court involving no-merit briefs, only two – *In re L.V.* and *In re A.S.*, __ N.C. App. __, __ S.E.2d __, 2018 WL 4201062 (2018) (unpublished) – have declined to conduct the *Anders*-type review requested in the no-merit briefs filed by the respondents' attorneys.

It is presumed that this Court acts correctly. This Court is required to dismiss an appeal, even *sua sponte*, whenever it is without jurisdiction or authority to act.[10] This duty is not in any manner diminished when this Court decides not to publish an opinion. This Court impliedly holds that it has the jurisdiction and authority to act whenever it considers the merits of an appeal. Though this Court may, in certain circumstances, recognize that is has been acting without authority and correct that error,[11] it may not do so lightly, nor without citation to the earlier precedent that served to invalidate the later holdings. I believe this Court's three published opinions that predate *In re L.V.* – and which are in complete accord with *every on*e of this Court's relevant unpublished opinions filed before *In re L.V.*, have thoroughly established the

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9. Had the reasoning in *In re L.V.* been applied to all no-merit appeals since the adoption of Rule 3.1(d), this Court would still be waiting to conduct its *first* review of an appeal pursuant to Rule 3.1(d), because only one *pro se* "brief" has been filed since 2009, and that "brief" was not even considered due to Rule 28(b)(6) violations.

10. Unless it applies an authorized discretionary writ or rule to allow review.

11. If, for example, this Court determines that it has been operating in ignorance of contrary holdings of prior opinions of this Court, or of our Supreme Court, it must acknowledge and adhere to that prior binding precedent – in effect "correct course" and disavow the prior incorrect holdings. *In re O.D.S.*, __ N.C. App. at __, 786 S.E.2d at 417.

appropriate requirements of Rule 3.1(d) – including the consequences of the failure of a respondent to file a *pro se* brief.

In a published opinion filed on 20 March 2018, this Court conducted the following review of the respondent-father's appeal:[12]

> Counsel for Respondent-Father filed a no-merit brief on his behalf, pursuant to N.C. R. App. P. 3.1(d), stating "[t]he undersigned counsel has made a conscientious and thorough review of the [r]ecord on [a]ppeal . . . . Counsel has concluded that there is no issue of merit on which to base an argument for relief and that this appeal would be frivolous." *Counsel asks this Court to "[r]eview the case to determine whether counsel overlooked a valid issue that requires reversal.*" Additionally, counsel demonstrated that he advised Respondent-Father of his right to file written arguments with this Court and provided him with the information necessary to do so. *Respondent-Father failed to file his own written arguments*.
>
> Consistent with *the requirements* of Rule 3.1(d), counsel directs our attention to two issues: (1) whether the trial court erred in concluding that grounds existed to terminate Respondent-Father's parental rights and (2) whether the trial court abused its discretion in determining that it was in the children's best interests to terminate Respondent-Father's parental rights. However, counsel acknowledges he cannot make a non-frivolous argument that no grounds existed sufficient to terminate Respondent-Father's parental rights or that it was not in the children's best interests to terminate his parental rights.
>
> *We do not find any possible error by the trial court*. The 25 April 2017 order includes sufficient findings of fact, supported by clear, cogent, and convincing evidence to conclude that at least one statutory ground for termination existed under N.C.G.S. § 7B-1111(a)(1). Moreover, the trial court made appropriate findings on each of the relevant dispositional factors and did not abuse its discretion in assessing the children's best interests. Accordingly, we affirm the trial court's order as to the termination of Respondent-Father's parental rights.

12. Both the respondent-father and the respondent-mother appealed termination of their parental rights. Only the respondent-father's appeal was pursuant to Rule 3.1(d).

In re A.A.S., __ N.C. App. at __, 812 S.E.2d at 879 (citations omitted) (emphasis added); *see also In re M.J.S.M.*, __ N.C. App. at __, 810 S.E.2d at 374–75; *In re M.S.*, 247 N.C. App. at 94, 785 S.E.2d at 593–94. I believe this Court's prior published opinions – *In re A.A.S.*, *In re M.J.S.M.* and *In re M.S.* – constitute controlling precedent, and mandate that this Court conduct a full *Anders*-type review whenever a respondent's attorney files a no-merit brief and complies with the requirements of Rule 3.1(d). *In re L.V.* could not have "overruled" these prior opinions. *In re O.D.S.*, __ N.C. App. at __, 786 S.E.2d at 417.

In the present case, as required by Rule 3.1(d), Respondent's attorney compiled and filed the 279 page record; composed and filed a twenty-four page no-merit brief that "identif[ied] issues in the record on appeal that might arguably support the appeal and [] state[d] why those issues lack merit or would not alter the ultimate result[;]" provided notice to Respondent and provided Respondent with the required materials; and attached evidence of compliance with the requirements of Rule 3.1(d) to the no-merit brief. DSS and the child's guardian *ad litem* also filed appellee briefs. Respondent did not avail himself of "the option of filing a pro se brief" as permitted by Rule 3.1(d).

Respondent's attorney complied with the requirements of Rule 3.1(d) for requesting an *Anders*-type review of the no-merit brief by this Court. Because I believe we are bound by the precedent set in *In re M.S.*, and subsequently followed by *In re A.A.S.* and *In re M.J.S.M.*, I believe *In re Civil Penalty* and its progeny require that we disregard the conflicting holding in *In re L.V.*, and conduct the requested Rule 3.1(d) *Anders*-type review.

Upon conducting the appropriate review, I would agree with Respondent's counsel and hold that the trial court's findings of fact support its conclusions that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1) and 7B-1111(a)(2) (2017), and that termination of Respondent's parental rights was in the best interest of the child. I would further agree that review of the record reveals no errors occurred at trial that would warrant reversal. I would therefore affirm.

LIPPARD v. DIAMOND HILL BAPTIST CHURCH

[261 N.C. App. 660 (2018)]

BARRY LIPPARD AND KIM LIPPARD, PLAINTIFFS
v.
DIAMOND HILL BAPTIST CHURCH, DEFENDANT

No. COA18-302

Filed 2 October 2018

Churches and Religion—ecclesiastical matters—entanglement—church membership

Plaintiffs' removal from a church's membership was a core ecclesiastical matter, in which the trial court properly concluded it was barred from entangling the courts.

Appeal by plaintiffs from judgment entered 19 January 2018 by Judge Anna Mills Wagoner in Iredell County Superior Court. Heard in the Court of Appeals 20 September 2018.

Winthrop and Winthrop, by Samuel B. Winthrop, for plaintiff-appellants.

E. Bedford Cannon for defendant-appellee.

TYSON, Judge.

Barry and Kim Lippard ("Plaintiffs") appeal from an order dismissing their lawsuit against Diamond Hill Baptist Church ("Defendant"). We affirm.

I. Background

Plaintiffs filed a complaint for declaratory judgment against Defendant on 8 December 2016, to seek a judicial declaration of whether they remained active members of Defendant-church. Plaintiffs alleged they had been members of the church for thirty-five years. In 2013, Plaintiffs filed a complaint against Defendant, the senior minister of the church, and the minister of music, alleging they had defamed Plaintiffs to the other members of the church community. *Lippard v. Holleman*, __ N.C. App. __, 789 S.E.2d 812, 2017 WL 1629377 at *1 (unpublished), *appeal dismissed*, 370 N.C. 70, 803 S.E.2d 625 (2017). While those claims were still active, Plaintiffs filed a second action with almost identical issues and facts in 2015. *Id.* at *2.

Subsequent to the filing of the 2013 complaint, Defendant claimed a vote was taken and Plaintiffs were removed as members of the church. Plaintiffs assert no votes were ever taken, and Defendant did not comply with the church constitution and bylaws in attempting to remove Plaintiffs as members. Plaintiffs also claim they were never informed of their removal as members in writing, nor were they given an opportunity to address the church community concerning their removal.

In answer to an interrogatory from the 2015 complaint, a church member stated a vote had been taken during a meeting held on 22 December 2013, wherein the members unanimously voted to remove Plaintiffs from church membership. Plaintiffs sought documentation of the alleged vote.

Defendant filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6) on 30 March 2017. After a hearing on Defendant's motion, the trial court filed a written order to dismiss Plaintiffs' claim. The court cited its lack of subject matter jurisdiction because Plaintiffs' status of membership in the church was a "core ecclesiastical matter." Plaintiffs timely appealed.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Issues

Plaintiffs assert their status of membership in the church is not a core ecclesiastical matter and argue the trial court erred by granting Defendant's motion to dismiss.

IV. Standard of Review

When considering a Rule 12(b)(1) motion to dismiss, a trial court "need not confine" its inquiry to the pleadings, but "may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998) (citation omitted). "If the evaluation is confined to the pleadings, the court must accept the plaintiff's allegations as true, construing them most favorably to the plaintiff." *Id.*

"We review a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12 of the North Carolina Rules of Civil Procedure *de novo*." *Burgess v. Burgess*, 205 N.C. App. 325, 327, 698 S.E.2d 666, 668 (2010).

V. Analysis

Courts should not and may not become entangled in purely ecclesiastical matters involving a church, but can resolve civil law matters which may arise from a church controversy. *Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 327, 605 S.E.2d 161, 163 (2004). Ecclesiastical matters include those

> which concern[] doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful *laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership* by the legally constituted authorities of the church[.]

Id. (emphasis supplied) (citation omitted).

To determine whether an issue is an ecclesiastical matter, "[t]he dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine." *Privette*, 128 N.C. App. at 494, 495 S.E.2d at 398. If the inquiry does not involve such interpretation, then neutral principles of civil law may be applied to resolve the issue. *Id.*

This Court has previously held "[m]embership in a church is a core ecclesiastical matter." *Tubiolo*, 167 N.C. App. at 328, 605 S.E.2d at 164. Plaintiffs point to a later section of *Tubiolo*, identifying church membership as a property interest, which gives the courts some jurisdiction over the issue. *Id.* at 329, 605 S.E.2d at 164. This Court noted the limits of this holding: "courts do have jurisdiction over the very narrow issue of whether the bylaws were properly adopted by the [church]." *Id.* at 329, 605 S.E.2d at 164.

Plaintiffs do not argue whether or not the bylaws were properly adopted. Instead, they assert the requirements of the bylaws were not followed by Defendant. Plaintiffs attached the relevant sections of the bylaws to their complaint:

> Section V – Termination of Membership
>
> Members shall be terminated in the following ways:
>
> . . .
>
> (3) Exclusion by action of the church
>
> . . .

> Section VI – Discipline
>
> . . .
>
> Should some serious condition exist which would cause a member to be a liability to the general welfare of the church, the pastor and the deacons will take every reasonable measure to resolve the problem in accord with Matthew 18. If it becomes necessary for the church to take action to exclude a member, a three-fourths (3/4) secret vote of the members present is required; and the church may proceed to declare the person to be no longer in the membership of the church. A spirit of Christian kindness and forbearance shall pervade all such proceedings.

Plaintiffs argue no vote was taken, they were never provided written notice of their removal, nor were they provided an opportunity to address the other members of the church to discuss their removal. The bylaws specifically call for "a three-fourths (3/4) secret vote" and do not provide for or require prior notice, an opportunity for the affected member to be heard, or a written notification of removal. Plaintiffs admit they were informed of the vote to exclude and their subsequent removal.

Plaintiffs also assert "[t]hat at no time did [they] take any action to have themselves removed from church membership." A determination of this issue would fall squarely within ecclesiastical matters beyond the jurisdiction of the courts. *See Azige v. Holy Trinity Ethiopian Orthodox Tewahdo Church*, __ N.C. App. __, __, 790 S.E.2d 570, 575 (2016) ("The courts cannot determine the 'immoral behavior' of plaintiffs for purposes of the bylaws nor can the courts evaluate whether a particular transaction serves the needs of the membership of this church without involvement in ecclesiastical matters."). "[W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off." *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139-40, 21 L. Ed. 69, 71 (1872).

VI. Conclusion

Plaintiff's allegations center around ecclesiastical matters, specifically "the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church." *Tubiolo*, 167 N.C. App. at 327, 605 S.E.2d at 163. We cannot apply neutral principles of law without delving into ecclesiastical matters to determine whether or not Plaintiffs were properly removed from the church

membership. *See Harris v. Matthews*, 361 N.C. 265, 273, 643 S.E.2d 566, 571 (2007).

"When a party brings a proper complaint . . . the courts will inquire as whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules. But when a party challenges church actions involving religious doctrine and practice, court intervention is constitutionally forbidden." *Id.* at 274-75, 643 S.E.2d at 572 (citation and internal quotation marks omitted).

Civil courts cannot become entangled with deciding what action may or may not have justified Plaintiffs' removal from church membership, and further inquiry by this Court into the matter is barred. *Id.*; *Bouldin*, 82 U.S. (15 Wall.) at 139-40 ("we cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off").

The trial court properly granted Defendant's motion to dismiss. The judgment appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and BERGER concur.

STATE OF NORTH CAROLINA
v.
JOSHUA A. BICE, DEFENDANT

No. COA17-1188

Filed 2 October 2018

1. Evidence—written statement of third party—no objection—consent to admission

The admission of a written statement by a third party in defendant's trial for multiple drug offenses did not amount to plain error where defendant elicited testimony about the statement on cross-examination of a State witness prior to its introduction, and did not object to and expressly consented to its admission.

2. Appeal and Error—preservation of issues—fatal variance between indictment and evidence—not raised at trial

Defendant failed to preserve for appellate review an argument that a fatal variance existed between his indictment for trafficking

opium by possession and the evidence at trial because he did not raise this issue as a basis for his motion to dismiss in the trial court.

3. Criminal Law—jury instruction—drug trafficking—ultimate user exemption

Evidence at defendant's trial for drug trafficking was insufficient to support a jury instruction on an "ultimate user" exemption in the Controlled Substances Act, because defendant's written confession, corroborated by his trial testimony, stated that he possessed his father's oxycodone pills in order to sell them to pay his bills and that he had researched how much money to charge for them.

4. Constitutional Law—effective assistance of counsel—not ripe for review

Defendant's claim of ineffective assistance of counsel in his trial for multiple drug offenses was dismissed without prejudice to his right to raise his claims in a motion for appropriate relief.

Appeal by defendant from judgment entered 17 November 2016 by Judge Reuben F. Young in Wayne County Superior Court. Heard in the Court of Appeals 20 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Cathy Pope, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith III, for defendant.

BERGER, Judge.

On November 17, 2016, a Wayne County jury convicted Joshua A. Bice ("Defendant") of possession of marijuana and trafficking opium by possession. Defendant alleges (1) error in the trial court's admission of hearsay; (2) a fatal variance between Defendant's indictment for trafficking opium by possession and the State's evidence; (3) error in the trial court's failure to instruct the jury on the statutory ultimate user exemption; and (4) ineffective assistance of counsel. We find no error.

Factual and Procedural Background

On the evening of September 18, 2015, Goldsboro Police Officer Donnie Head ("Officer Head") and North Carolina Alcohol Law Enforcement Agent Brian White ("Agent White") were parked in an unmarked police car at a Kangaroo gas station in Goldsboro, North Carolina, where they observed a Ford pick-up truck parked at the gas

pumps. Rather than pumping gas, the driver of the pick-up truck, later identified to be Jason Hyland ("Hyland"), remained in his vehicle until Defendant's silver Honda pulled into the parking lot. Hyland immediately exited his vehicle and walked to Defendant's parked car.

Officer Head testified at trial that when Hyland reached Defendant's car, they "transfer[red] something between their hands." Hyland immediately returned to his vehicle. Based upon their training and experience, Officer Head and Agent White believed they had witnessed a drug transaction and decided to investigate further. Officer Head approached Defendant while Agent White approached Hyland.

When Officer Head approached Defendant, he observed "[Defendant] sitting in the driver's seat. There [were] no other occupants in the vehicle. [Defendant] was holding a pill bottle in his hand." After Officer Head identified himself and informed Defendant why he was there, Officer Head witnessed Defendant "quickly hid[e] the pill bottle down between his leg[s]." At Officer Head's direction, Defendant identified himself and handed Officer Head the pill bottle, which contained fifty-four oxycodone pills prescribed to Grover Bice.

After Officer Head asked Defendant to step out of his car, Defendant told him that the pills belonged to Defendant's father, who was receiving cancer treatment. Officer Head then searched Defendant and found $190.00 in cash in Defendant's wallet and a clear bag of marijuana in the pocket of his pants. Defendant was placed under arrest and read his *Miranda* rights, which Defendant expressly waived by signing and initialing a written waiver.

When Defendant was interviewed, he admitted he went to the gas station to buy marijuana. Defendant also claimed the oxycodone pills belonged to his father, who often rode in Defendant's car. Defendant signed and initialed each line of a written confession, which stated:

> I made a mistake. I was trying to help my parents out because my dad has cancer. I was selling the pills to make money to pay bills. I don't get a profit off it. I just started selling them today. I have never sold them before. I don't sell any other drugs. It was stupid of me. He just got them filled today. There was 100 pills. My dad kept 5. I sold Jason Hyland 41 earlier today for $250.00 cash. Tonight he was going to buy 12 pills for $100 cash approximately. I looked on Google to see how much they sold on the street for. I saw they sold for $5-$15 each.

Defendant was indicted for trafficking opium by possession, possession with intent to sell or deliver opium, and possession of marijuana. Prior to trial, the State dismissed the charge of possession with intent to sell or deliver opium.

At trial, Defendant testified that he had never seen the confession bearing his signature and initials. However, when asked to review the confession, Defendant admitted that he signed and initialed each line of the statement. Defendant also testified that he recognized the specific content of his *Miranda* rights waiver and remembered reviewing, signing, and initialing each line of this waiver during the same interrogation. Defendant also admitted that he understood "quite well" that he was "in a very serious situation" when he was being interrogated, and also acknowledged that he had conducted internet research of his father's medication.

Officer Head testified that Defendant's confession reflected an exact transcription of Defendant's responses to Officer Head's interview questions. Officer Head also testified that he read the statement to Defendant, and handed the statement to Defendant. Defendant then "read over the statement, he initialed each line, that this—these were his words and this was a correct statement, and then at the very end of it I had him draw a line from the bottom of his statement to the bottom of the page so I couldn't write or change anything in this statement where he signed and put the date." Officer Head also stated that he gave Defendant the opportunity to make any changes to the written confession, but Defendant did not "indicate he wanted to add anything, or change anything."

Neither Agent White nor Hyland testified at trial. However, Officer Head testified that Agent White found several $20.00 bills in Hyland's possession, but no pills or other contraband. Because Agent White was not present at trial, Officer Head was allowed to read into evidence a hand-written statement that Hyland had given to Agent White. Defendant did not object to the admission of Hyland's statement, which said: "I, Jason Hyland, met with [Defendant] at Bojangles' in Princeton to buy oxycodone [and] an hour later at the Kangaroo on 70 where I was about to purchase more and the cops saw us about to do a hand-to-hand and approached us." The statement was signed by Hyland; dated September 18, 2015, at 11:12 p.m.; and was corroborated by Defendant's testimony that he had met with Hyland at Bojangles' earlier on September 18, 2015 to purchase more than three grams of marijuana.

After the statement was read into evidence, the State offered a copy of Hyland's hand-written statement into evidence. The trial court

specifically asked if there were any objections to the admission of Hyland's statement, and Defendant replied that he had no objection to its admission.

Defendant was convicted of trafficking opium by possession and possession of marijuana. He was sentenced to seventy to ninety-three months in prison, fined $50,000.00, and placed on probation upon his release from prison. Defendant timely appeals, alleging the trial court erred by admitting Hyland's hearsay statement, denying his motion to dismiss on fatal variance grounds, and by not instructing the jury on the statutory ultimate user exemption. Defendant also asserts he received ineffective assistance of counsel.

Analysis

I. Hearsay

[1] Defendant first challenges the trial court's admission of Hyland's written statement into evidence, arguing that it was inadmissible hearsay. Defendant concedes he failed to object to the admission of the statement, and thus, did not preserve this issue for review. Instead, Defendant requests this Court review the admission of Hyland's statement for plain error. We find that Defendant is not entitled to appellate review on this issue.

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). The Supreme Court of North Carolina "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996), *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998).

Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and quotation marks omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would

have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Here, Defendant has failed to demonstrate that any "judicial action" by the trial court amounted to error. N.C.R. App. P. 10(a)(4). Defendant not only failed to object to the entry of Hyland's statement, but he also expressly consented to the admission of the same. Defendant now argues that the admission of Hyland's statement was an error by the trial court.

When the State introduced Hyland's written statement at trial, the following exchange took place:

> THE COURT: All right. Any objection to State's Exhibit No. 7?
>
> [Defense Counsel:] No, sir, Judge.
>
> THE COURT: All right. Then State's Exhibit No. 7 is hereby admitted into evidence.

This action by defense counsel to consent to the admission of Hyland's statement may have been the result of strategic decisions made by Defendant and trial counsel, or Hyland's statement may have been admitted because of questionable performance by counsel. Whatever the reason, a trial court is not required to second guess every decision, action, or inaction by defense counsel. Imposing such a requirement on our trial courts is neither desirable nor workable.

While the trial court should "see that the essential rights of an accused are preserved, the judge should not interfere in the attorney-client relationship in the absence of such gross incompetence or faithlessness of counsel as should be apparent to the trial judge and thus call for action by him." *State v. Blackwood*, 60 N.C. App. 150, 153, 298 S.E.2d 196, 199 (1982) (citation and quotation marks omitted). Even though Defendant has argued that his counsel's assistance was deficient, he has not alleged his trial counsel was grossly incompetent or faithless in his duties, and the record does not reflect gross deficiencies.

In *State v. Lashley*, the defendant alleged on appeal, among other things, that the trial court erred in admitting certain evidence despite the lack of objection by a *pro se* defendant. This Court stated that *pro se* defendants were not wards or clients of the court, and they could not "expect the trial judge to relinquish his role as impartial arbiter in exchange for the dual capacity of judge and guardian angel of defendant." *State v. Lashley*, 21 N.C. App. 83, 85, 203 S.E.2d 71, 72 (1974).

Defendants who are represented by counsel are not entitled to greater protections by the trial court than those afforded to *pro se* defendants.

Thus, because Defendant not only failed to object but also expressly consented to the admission of Hyland's statement, we cannot conclude the trial court erred by permitting the admission of such evidence per both parties' agreement.

Even if Defendant could correctly assert the trial court somehow erred, "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2017). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *disc. review dismissed*, 355 N.C. 216, 560 S.E.2d 142 (2002).

Where a defendant "posed a question that incorporated inadmissible material [during cross-examination], [d]efendant is simply not entitled to seek appellate relief on the grounds that the challenged testimony should have been excluded." *State v. Dew*, 225 N.C. App. 750, 758, 738 S.E.2d 215, 221, *disc. review denied*, 366 N.C. 595, 743 S.E.2d 187 (2013). This is because "[s]tatements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Global*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) (citations omitted), *affirmed*, 362 N.C. 342, 661 S.E.2d 732 (2008).

Here, although neither Agent White nor Hyland were present to testify at trial, Officer Head read Hyland's statement into evidence and the written statement was admitted without objection and with Defendant's consent. However, the State did not elicit the introduction of Hyland's statement during Officer Head's direct examination. In fact, neither the State nor Officer Head referenced Hyland by name nor mentioned his statement during direct examination.

Rather, during Officer Head's cross examination, Defendant elicited the following testimony regarding Hyland and his statement:

> [Defense Counsel:] Okay. And the other gentleman was released.
>
> [Officer Head:] Yes.
>
> [Defense Counsel:] Okay. Now, was he released there at the scene?

[Officer Head:] He was.

[Defense Counsel:] He was? Well, if he was released at the scene, um . . . if he was released at the scene, how did the statement become or how did they—how was a statement obtained from him at 11:12 that evening . . . in this case?

[Officer Head:] The ALE agent, Special Agent White, took the statement on-scene, and then released him.

[Defense Counsel:] He took the statement on-scene?

[Officer Head:] Correct.

[Defense Counsel:] Okay. And where—did he handwrite it out or what?

[Officer Head:] I'm not sure, I was not—I didn't see him write the statement; I was dealing with [Defendant] while Special Agent White was dealing with [Hyland].

[Defense Counsel:] Okay. *So he got it—he obtained a statement from the other individual that a drug transaction didn't take place and released him at the scene.*

[Officer Head:] I can read that statement if you wish me to.

[Defense Counsel:] No, I just—I was just wondering where the statement came—did you see him do that with the other gentleman?

[Officer Head:] Special Agent White took the statement. I was not right there when the statement was being given, so I can't testify of who wrote the statement or.

[Defense Counsel:] Okay. . . .

(Emphasis added.)

Defendant's questions concerning the content of Hyland's statement opened the door to the State's subsequent questions concerning the statement and introduction of the written statement. In response to Defendant's questions on cross examination, the State then asked Officer Head to identify and read Hyland's statement to the jury for the first time during re-direct examination. The State then offered a copy of Hyland's written statement into evidence as State's Exhibit 7.

Not only did Defendant open the door to the introduction of Hyland's statement, but, again, Defendant explicitly consented to its admission into evidence. Accordingly, we find no error in the introduction of Hyland's statement.

II. Fatal Variance

[2] Defendant next argues that the trial court erred in denying his motion to dismiss his trafficking opium by possession charge as there was a fatal variance between the allegations contained in the indictment and the evidence offered at trial. However, Defendant failed to properly preserve this argument for review because he raises this issue for the first time on appeal.

> A fatal variance between the indictment and proof is properly raised by a motion for judgment as of nonsuit or a motion to dismiss, since there is not sufficient evidence to support the charge laid in the indictment. A motion to dismiss for a variance is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.

State v. Glenn, 221 N.C. App. 143, 147, 726 S.E.2d 185, 188 (2012) (*purgandum*[1]).

"In order to preserve a fatal variance argument for appellate review, a defendant must specifically state at trial that a fatal variance is the basis for his motion to dismiss." *State v. Scaturro*, ___ N.C. App. ___, ___, 802 S.E.2d 500, 505 (citations omitted), *disc. review dismissed as moot*, 370 N.C. 217, 804 S.E.2d 530 (2017). For example, in *State v. Hooks*, this Court dismissed defendant's fatal variance argument because defendant "based his motion to dismiss solely on insufficiency of the evidence . . . [and] did not allege the existence of a fatal variance between the indictment and the jury instructions" at trial. *State v. Hooks*, 243 N.C. App. 435, 442, 777 S.E.2d 133, 139, *disc. review denied*, *cert. denied*, 368 N.C. 605, 780 S.E.2d 561 (2015).

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1. Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

Here, a review of the trial transcript reveals that Defendant never alleged a fatal variance when he moved to dismiss his trafficking opium by possession charge at trial. Instead, as in *Hooks*, Defendant moved for dismissal based on insufficiency of the evidence rather than a fatal variance. Defendant has waived his right to appellate review of this issue, and it is dismissed.

III. Jury Instruction

[3] Defendant asserts that the trial court erred in failing to instruct the jury on an exemption to his trafficking opium by possession charge. More specifically, Defendant contends that he is exempt from prosecution for violating Section 90-95(h)(4) of North Carolina's Controlled Substances Act ("the Controlled Substances Act") because he is an "ultimate user" pursuant to Section 90-101(c) of the Controlled Substances Act. Defendant concedes that he did not request an instruction on the ultimate user exemption at trial nor did he object to the trial court's omission of this instruction. Defendant therefore requests for this Court to review for plain error. We find no plain error.

In order to establish plain error, Defendant "must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (*purgandum*).

Our Supreme Court has held "on numerous occasions that it is the duty of the trial court to instruct the jury on all of the substantive features of a case." *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1998) (citations omitted). "All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *Id.* (citations omitted).

"Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). The trial court's duty to instruct the jury "arises notwithstanding the absence of a request by one of the parties for a particular instruction." *Loftin*, 322 N.C. at 381, 368 S.E.2d at 617 (citations omitted).

> For a jury instruction to be required on a particular defense, there must be substantial evidence of each element of the defense when the evidence is viewed in the light most favorable to the defendant. Substantial evidence is evidence that a reasonable person would find

> sufficient to support a conclusion. Whether the evidence presented constitutes substantial evidence is a question of law.

State v. Hudgins, 167 N.C. App. 705, 709, 606 S.E.2d 443, 446 (2005) (*purgandum*).

Section 90-95 of the Controlled Substances Act "makes the possession, transportation[,] or delivery of a controlled substance a crime." *State v. Beam*, 201 N.C. App. 643, 649, 688 S.E.2d 40, 44 (2010). Any person who possesses more than four but less than fourteen grams of opium can be found guilty of the Class F felony of trafficking opium by possession. N.C. Gen. Stat. § 90-95(h)(4)(a) (2017). The defendant "unlawfully possesses" opium if he or she knowingly possesses it with "both the power and intent to control the disposition or use of that substance." *State v. Galaviz-Torres*, 368 N.C. 44, 50, 772 S.E.2d 434, 438 (2015).

However, Section 90-101(c) dictates that some individuals are deemed lawful possessors of certain controlled substances. N.C. Gen. Stat. § 90-101(c) (2017). One such individual is "[a]n ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner." N.C. Gen. Stat. § 90-101(c)(3). The Controlled Substances Act defines an "ultimate user" as "a person who lawfully possesses a controlled substance for his own use, or for the use of a member of his household." N.C. Gen. Stat. § 90-87(27) (2017).

Defendant does not contest that he was found in possession of "54 dosage units of Oxycodone weighing 6.89 grams." Rather, Defendant contends that the trial court erred in not instructing the jury *sua sponte* on the ultimate user exemption. However, we find that the record lacks substantial evidence by which a jury instruction on the ultimate user exemption would have been required.

The evidence tended to show that Defendant did not lawfully possess fifty-four of his father's oxycodone pills solely for his father's prescribed use, as required to fall within the ultimate user exemption. Rather, the record reflects overwhelming evidence demonstrating that Defendant possessed his father's oxycodone for his own purpose of unlawfully selling his father's pills.

While Defendant presented evidence that the oxycodone found in his possession was prescribed to his father, that Defendant would drive his father to and from appointments related to his care, and that Defendant lived with and cared for his father, no reasonable person

could conclude that Defendant was in lawful possession of his father's oxycodone at the time of his arrest.

Defendant signed and initialed each line of a written confession in which Defendant admitted that he "was selling the pills to make money to pay bills . . . [and had] sold Jason Hyland 41 [pills] earlier [that day] for $250.00 cash." Defendant's written confession also stated that Defendant "looked on Google to see how much money [the oxycodone pills] sold on the street for" and that Defendant was planning to sell twelve more pills to Hyland later that night. Defendant's written confession was corroborated by Defendant's trial testimony, in which Defendant conceded that he recently researched oxycodone.

Moreover, although Defendant testified that he had never seen his signed confession before trial, he later admitted under oath that he signed and initialed each line of his written confession. Defendant also testified that he recognized the specific content of his *Miranda* rights waiver and remembered reviewing, signing, and initialing each line of this waiver during the same interrogation. Defendant further admitted that he understood "quite well" that he was "in a very serious situation" when he was being interrogated.

Because Defendant failed to present substantial evidence that he possessed the fifty-four oxycodone pills solely for his father's lawful use, he was not entitled to an instruction under Section 90-87(27), even when the evidence is viewed in the light most favorable to Defendant. Thus, the trial court did not err as no instruction on the ultimate user exemption was required. Because the evidence did not support the instruction, Defendant cannot show plain error.

IV. Ineffective Assistance of Counsel

[4] Finally, Defendant asserts that he received ineffective assistance of counsel because his counsel failed to object and agreed to the admission of Hyland's statement and failed to request a jury instruction on the ultimate user exception. We decline to address this claim on direct appeal.

If "the record before this [c]ourt is not thoroughly developed regarding . . . counsel's reasonableness, or lack thereof, . . . [then] the record before us is insufficient to determine whether defendant received ineffective assistance of counsel." *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017). Here, the record before us is insufficient to determine whether trial counsel was ineffective or whether there were reasonable, strategic reasons for counsel's actions. Accordingly, we dismiss

Defendant's ineffective assistance of counsel claim without prejudice to his right to assert his claim in a motion for appropriate relief.

Conclusion

Accordingly, we find no error in the trial court's admission of Hyland's statement as there was no "judicial action" at issue where both parties consented to the entry of the statement. In addition, Defendant has waived appellate review of his fatal variance claim. Defendant was not entitled to an instruction on the ultimate user exemption, and the trial court was not required to provide an instruction to the jury on this issue *sua sponte*. Finally, we dismiss Defendant's ineffective assistance of counsel claim without prejudice.

NO ERROR IN PART; DISMISSED IN PART.

Judges BRYANT and TYSON concur.

STATE OF NORTH CAROLINA
v.
KEVIN DESHAUN DIXON, Defendant

No. COA17-1333

Filed 2 October 2018

1. Appeal and Error—motions to suppress—no affidavits—waiver of appellate review

In a first-degree murder trial, defendant's failure to include supporting affidavits with several motions to suppress various documentary evidence as required by N.C.G.S. § 15A-977(a) constituted a waiver of his right to appellate review of any challenges to the admission of that evidence. Further, where some of the motions were not actually ruled upon by the trial court and defendant did not object to admission of the underlying evidence, defendant failed to preserve review of those motions for appeal.

2. Evidence—motions to suppress—oral findings of fact—sufficiency

In a first-degree murder trial, the trial court did not err by making oral findings of fact regarding multiple pretrial motions to suppress even though it had ordered the State to prepare written motions, which it failed to do, because there were no conflicts in the evidence

requiring the court to make any findings of fact, much less written ones, and the detailed findings were sufficient to support the conclusions of law. While the trial court referred to its oral findings as "sketches" that could be supplemented with proposed findings offered by the parties, nothing in the record suggested the judge had not made up his mind or intended to enter a written order contrary to the facts found and conclusions already reached.

3. Evidence—character—other crimes, wrongs, or acts—photographs—guns—hand gestures

The trial court did not abuse its discretion by admitting photographs obtained from defendant's phone showing guns and showing defendant making certain hand gestures. Gun ownership is constitutionally protected and not indicative of bad character, and the hand gestures did not indicate gang affiliation despite defendant's argument otherwise. In any event, the trial court instructed the State not to ask any questions about signs or gang affiliation based on the photo of the hand gestures.

4. Evidence—relevance—photographs—guns—location of shooting

The trial court did not abuse its discretion by admitting photographs showing guns and showing defendant making certain hand gestures, because the photographs were obtained from defendant's phone, showed he had access to firearms, and depicted him at nearly the same location where the shooting occurred, making them relevant to defendant's charges of felony murder and discharging a firearm into an occupied vehicle.

5. Identification of Defendants—in-court identification—findings and conclusions—sufficiency

The trial court did not err in admitting a witness's in-court identification of defendant as the perpetrator of her fiance's murder because there was no conflict in the evidence requiring express factual findings on the alleged absence of a completed witness confidence statement at a photo lineup or the witness's inability to choose between a photo of defendant and that of another man in the photo lineup, nor was there any evidence that the witness heard defendant's name prior to being shown the photo lineup. The court properly concluded the evidence was relevant, admissible, and sufficient to go to the jury for a credibility determination.

Appeal by Defendant from Judgments entered 25 May 2017 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc Bernstein, for the State.

Marilyn G. Ozer for Defendant-Appellant.

INMAN, Judge.

Defendant Kevin Deshaun Dixon ("Defendant") appeals from judgments entered following a jury verdict finding him guilty of discharging a firearm into an occupied vehicle in operation inflicting serious injury, felony murder, and possession of marijuana with the intent to sell. Defendant argues that the trial court erred in: (1) failing to enter written orders on several motions to suppress; (2) admitting into evidence inadmissible and unduly prejudicial photographs; and (3) permitting the victim's fiancé, an eye witness, to identify Defendant in court. After careful review, we hold that Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

On 26 November 2014, Maria Monje ("Monje") and her fiancé Andres Alberto Martinez Trochez ("Martinez Trochez") were driving through a neighborhood in Concord, North Carolina, looking to buy marijuana. Monje was driving the car, and Martinez Trochez was in the front passenger seat. As they were searching for a dealer, the two spotted a group of five to eight men standing by a silver Ford Mustang with a black racing stripe. One of the men waved and shouted at Monje and Martinez Trochez, beckoning them to pull over. They did, and the man approached the passenger side of their vehicle. The man asked to borrow Martinez Trochez's cellphone; Martinez Trochez asked if the man had any marijuana. At this point, the man opened Martinez Trochez's car door, pulled a small black gun out from under his shirt, held it to Martinez Trochez's chest, and demanded money. While Monje searched the backseat for cash, the man shot Martinez Trochez. Seeing her fiancé had been shot, Monje immediately took control of the vehicle and drove away from the men gathered by the Mustang. As she was fleeing, at least two more shots were fired at her car by another man, shattering a rear passenger window.

Monje drove to a nearby police station, where officers attempted to save Martinez Trochez's life. EMS arrived a short time later and pronounced Martinez Trochez dead. Monje described for police the location of the shooting and the silver Mustang the shooters were congregated around when she and Martinez Trochez had pulled over.

Law enforcement immediately broadcast the description of the Mustang and began searching for the vehicle in the area of the shooting. Detective Patrick Merritt ("Detective Merritt") drove Monje to the scene of the crime while the search for the Mustang was underway. While Monje and Detective Merritt were en route, another officer located a silver Mustang with a black racing stripe on a road a few dozen yards away from the crime scene. The officer ran the license plate and discovered the Mustang was registered to Defendant.

Meanwhile, at the crime scene with Detective Merritt, Monje identified Charles Mann ("Mann") as one of the men present at the shooting. The detective then drove Monje to the location of the Mustang, where she positively identified the vehicle as the one from the crime scene. Police also searched Monje's vehicle, discovering shell casings and bullets matching a .45 caliber gun.

In the course of the investigation into Martinez Trochez's homicide, investigators asked Monje to review a photographic line-up of five men. Monje identified two men, one of whom was Defendant, as the possible shooter. Monje's tentative identification, combined with Defendant's ownership of the Mustang, led police to focus on Defendant as their prime suspect.

Six days after the shooting, on 2 December 2014, warrants for Defendant's arrest were issued. He was arrested the following day and indicted on 15 December 2014.

While Defendant was incarcerated pending trial, a sheriff's deputy at the Cabarrus County detention center found a "kite," or a letter passed between inmates, bearing Defendant's initials on the floor outside the cluster of cells housing him. The kite discussed in detail Defendant's case, mentioned Mann as the State's best evidence against Defendant, and asserted that Mann needed to keep quiet, as he was Defendant's alibi. Defendant later asked the sheriff's deputy what happened to the kite, as "he had written some shit on it that he shouldn't have."

Police were also provided with a second letter found by a cleaning crew that had worked in the home where Defendant's Mustang was registered (the "Cleaning Crew Letter"). That letter, addressed to Defendant's brother, discussed in detail the evidence the State had collected showing Defendant's guilt, and mentioned that Mann's testimony would be detrimental to his defense. The letter also stated that Defendant would be convicted if Monje and Mann testified. The letter provided names and contact information of people who could be paid to prevent those two witnesses from testifying.

Other evidence collected by investigators included a cell phone taken from Defendant. The phone contained two photographs of firearms (the "Gun Photos"), including one attached to a message sent from Defendant's phone saying "I stay wit dem irons," referring to the guns. A third photograph recovered from the phone showed Defendant and another man leaning against the hood of a silver Mustang with a black racing stripe on the street where Martinez Trochez was shot (the "Mustang Photo"). Both men in the photo are displaying the hand sign for the number "4" with their left hands, while the man on the right is displaying a closed right hand with his middle finger extended.

Defendant filed several pre-trial motions to suppress the above evidence, including: (1) Monje's identification of Defendant in the photo line-up (the "Line-Up Motion"); (2) Monje's in-court identification of Defendant (the "ID Motion"); (3) the kite (the "Kite Motion"); (4) Monje's identification and descriptions of the silver Mustang (the "Mustang Motions"); and (5) the photographs, text messages, and location data retrieved from Defendant's cell phone (the "Cell Phone Motion").[1] With one exception, the trial court rendered oral orders denying these motions; however, the trial court entered no written orders. The judge at various points described his oral findings and conclusions as "sketches" of those he instructed the prosecutor to include in a proposed written order, and he suggested that the parties offer additional proposed findings of fact for him to consider. But nothing in the record suggests that the findings and conclusions the judge recited from the bench were not, in fact, the trial court's actual findings and conclusions from the evidence and applicable law.

During trial, when the State sought to introduce the Gun and Mustang Photos, Defendant objected, asserting that the photos were inadmissible under Rules 402, 403, and 404 of our Rules of Evidence. Defendant's counsel argued that the Gun Photos were inadmissible because they did not match Monje's description of the murder weapon and were otherwise inadmissible character evidence prohibited by Rule 404(a) of the North Carolina Rules of Evidence. Defendant's counsel argued that the Mustang Photo was inadmissible because the hand gestures by the men in the photograph could be construed as gang signs by the jury and therefore constituted inadmissible character evidence prohibited by Rule 404(b). The trial court overruled Defendant's objections but instructed the State not to ask any witness the meaning of the hand

1. The Cell Phone Motion argued only that the cell phone was unlawfully seized from Defendant. It did not argue that the phone or files found thereon were irrelevant, prejudicial, or otherwise inadmissible under our Rules of Evidence.

gestures in the Mustang Photo; the trial judge announced his ruling from the bench but entered no written order.

On 25 May 2017, after two days of deliberation, the jury returned guilty verdicts on the charges of first-degree felony murder, discharging a firearm into an occupied vehicle while in operation inflicting serious injury, and possession with the intent to sell marijuana. The jury found Defendant not guilty of attempted robbery with a firearm.

The trial court arrested judgment on the discharging a firearm charge and sentenced Defendant to life imprisonment without parole for first-degree felony murder. The trial court also sentenced Defendant to a minimum six months and maximum seventeen months imprisonment for possession of marijuana with the intent to sell, which was suspended for 24 months of supervised probation. Defendant gave notice of appeal in open court.

II. ANALYSIS

Defendant presents three arguments on appeal: (1) the trial court committed reversible error in failing to enter written orders on the various motions to suppress; (2) the trial court erred in admitting the Mustang and Gun Photos; and (3) the trial court impermissibly permitted Monje to provide an in-court identification of Defendant. We address each argument in turn below, and hold that the trial court did not commit error.

a. Suppression Motions

[1] At the outset of this analysis, we note that Defendant's Kite, Cleaning Crew Letter, and Mustang Motions were not submitted to the trial court with supporting affidavits as required by N.C. Gen. Stat. § 15A-977(a). Defendant's failure to file affidavits with these motions is "a waiver on appeal of the right to contest the admission of evidence on either statutory or constitutional grounds." *State v. McQueen*, 324 N.C. 118, 128, 377 S.E.2d 38, 44 (1989). We therefore decline to review the trial court's orders on those motions and dismiss this portion of Defendant's appeal. *See State v. Holloway*, 311 N.C. 573, 577, 319 S.E.2d 261, 264 (1984) (dismissing an argument on appeal for this reason). Furthermore, it does not appear from the record that the trial court ruled on the Mustang Motions, nor does it appear that Defendant objected to the evidence encompassed by those motions when introduced at trial. Defendant also does not argue plain error. As a result, Defendant has failed to preserve review of the Mustang Motions on appeal. *State v. Oglesby*, 361 N.C. 550, 554-55, 648 S.E.2d 819, 821 (2007).

[2] When reviewing the failure of a trial court to enter a written order on a motion to suppress, we look first to whether there exists a material conflict in the evidence requiring a finding of fact. *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015). "When there is no conflict in the evidence, the trial court's findings can be inferred from its decision[,]" and findings of fact are not required. *Id.* at 312, 776 S.E.2d at 674 (citation omitted). "[O]ur cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing." *Id.* at 312, 776 S.E.2d at 674.

Regardless of whether findings of fact are required, "it is still the trial court's responsibility to make the conclusions of law . . . [and] failure to make any conclusions of law in the record [is] error." *State v. McFarland*, 234 N.C. App. 274, 284, 758 S.E.2d 457, 465 (2014). Such conclusions "require[] 'the exercise of judgment' in making a determination, 'or application of legal principles' to the facts found." *Id.* at 284, 758 S.E.2d at 465 (quoting *Sheffer v. Rardin*, 208 N.C. App. 620, 624, 704 S.E.2d 32, 35 (2010)).

Defendant argues that oral findings and conclusions made by the trial court from the bench are insufficient because the trial judge expressly ordered the State to prepare written orders on the motions and the State failed to do so. We disagree. If a written order is not required and an oral order may be sufficient in certain circumstances, *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674, the failure to go above and beyond that which is required by law does not render an otherwise lawful order erroneous. In other words, a minimally sufficient order is still exactly that—sufficient—even if more was ordered or requested by the trial court. Given this standard, the trial court committed reversible error only if: (1) there are conflicts in the evidence that the trial court failed to resolve either orally or in writing, through an explicit factual finding, *id.* at 312, 776 S.E.2d at 674; or (2) the trial court failed to make the necessary conclusions of law on the record. *McFarland*, 234 N.C. App. at 284, 758 S.E.2d at 465.

Neither the trial transcript nor the court's oral order on the Photo Line-Up Motion noted any conflicts in the evidence, and Defendant points to none on appeal.[2] On this record, the trial court was not required to

2. Defendant pointed to no conflicts concerning the Photo Line-Up Motion in his principal brief, and identified evidentiary conflicts in his reply brief only in regard to the ID Motion.

make findings orally or in writing.[3] *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. Nonetheless, the trial court made detailed findings of fact supporting its ruling. The trial court concluded as a matter of law that the evidence challenged in the Photo Line-Up Motion was relevant and more probative than prejudicial "after considering all the information before the Court[,]" and that "[t]he line-up was not unduly suggestive as alleged in the motion." Because the trial court's conclusions were supported by its factual findings and those findings were supported by the evidence presented, we hold that Defendant has failed to demonstrate reversible error. *Cf.*, *e.g.*, *State v. Faulk*, ___ N.C. App. ___, ___, 807 S.E.2d 623, 628-31 (holding reversible error occurred when the trial court denied a motion to suppress without making a single conclusion of law, applying the law to any facts, or disclosing the rationale for the court's decision); *McFarland*, 234 N.C. App. at 284, 758 S.E.2d at 464-65 (holding the trial court failed to make necessary conclusions of law when it merely recited legal principles rather than drawing legal conclusions by applying those principles to the facts).

The trial court also recited its factual findings in detail when ruling on the ID Motion. Despite these findings, Defendant contends that material conflicts in the evidence were not resolved in the oral order. Specifically, Defendant asserts that Monje's inability to describe Defendant in detail in a written statement to police or to identify Defendant conclusively in the photo line-up constituted material conflicts in the evidence, insofar as they "materially conflict with Ms. Monje's claim on direct-examination that she had 100% confidence that she could identify [Defendant] on the day of the shooting." We disagree.

"[A] material conflict in the evidence . . . [is] one that potentially affects the outcome of the suppression motion." *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. However, the only issues raised by Defendant's evidence point to the reliability of Monje's in-court identification, which was not a question for the trial court:

> [A]n identification of the perpetrator of a crime is not inadmissible because the witness is not absolutely certain of the identification, so long as the witness had a reasonable possibility of observation sufficient to permit subsequent identification. Such uncertainty goes to the credibility and weight of the testimony, and it is well established that the

3. For example, the evidence is uncontroverted that Monje did not execute a witness confidence statement as part of her photo line-up. Because there was no conflict here, no finding as to that fact was required. *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674.

> credibility, probative force, and weight of the testimony are matters for the jury.

State v. Moses, 350 N.C. 741, 767, 517 S.E.2d 853, 869 (1999) (citations, quotation marks, and original alterations omitted). Because the evidence presented, including that pointed to by Defendant,[4] did not raise a material conflict for the trial court to resolve in the suppression hearing, it was not required to make factual findings on the record. *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674.

The trial court concluded that the evidence subject to the ID Motion was relevant and passed the balancing test of Rule 403 "after considering all the information before the Court at this time." Because these conclusions were drawn following a recitation of the facts and were based on the findings and evidence, the trial court properly "rendered a legal decision, in the first instance," as to the relevance and admissibility of the evidence at issue. *State v. Baskins*, ___ N.C. App. ___, ___, 786 S.E.2d 94, 99 (2016) (internal citation and quotation marks omitted). The trial court expressly reached its conclusions by considering the facts and applying the relevant rules of evidence to those facts and therefore did not err in denying the ID Motion. *Cf. id.* at ___, 786 S.E.2d at 99 (holding a "conclusion" was not in actuality a conclusion of law where it consisted of a simple statement of law that detention of a motorist for probable cause does not violate the Fourth Amendment followed by a separate statement that the detention in the case was justified).

For the same reason, we also affirm the trial court's ruling on the Statement Motions, which concerned pre-arrest and post-arrest interviews of Defendant by police. Again, the record discloses no conflicting evidence requiring findings of fact, and Defendant points to none on appeal. The trial court still made oral findings of fact, although it was not required to do so. *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. Specifically, the trial court made detailed, numbered findings of fact

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4. At oral argument, Defendant's appellate counsel raised potential evidentiary conflicts concerning where Monje said the shooting occurred, why Monje had stopped there, and what interactions Defendant had with the victim at the stop. None of these conflicts was identified in Defendant's appellant brief, or in his reply brief. Assuming *arguendo* that Defendant's argument as to these conflicts are not waived, they do not "potentially affect[] the outcome of the suppression motion," and were therefore not material conflicts requiring resolution. *Bartlett*, 368 N.C. at 312, 776, S.E.2d at 674. Indeed, Defendant's counsel made a conclusory argument concerning this evidence and did not identify how resolution of these conflicts could have potentially affected the trial court's order on the ID Motion. Defendant's counsel instead argued only that it affected Monje's credibility, which is a question for the jury. *Moses*, 350 N.C. at 767, 517 S.E.2d at 869.

concerning the pre-arrest interview, namely that: (1) Defendant met with police; (2) police informed him he was not under arrest and free to leave; (3) Defendant chose not to leave, had his cell phone available to him, and was left alone in the interview room on several occasions; and (4) Defendant's statements in the interview were reduced to writing but never signed by him. From these findings, the trial court concluded that "[D]efendant voluntarily and intelligently and willingly participated in the interview[,]" that he "was not under arrest[,]" and, "under the totality of the circumstances, [police] were not required to read [D]efendant his *Miranda* rights during this noncustodial interview."

The trial court also rendered oral findings of fact concerning the post-arrest interview, namely that: (1) Defendant was represented by counsel at the time; (2) Defendant requested the interview with police; and (3) Defendant's *Miranda* rights were explained to him and he signed a written waiver of those rights. From these findings, the trial court concluded that " [D]efendant voluntarily—knowingly, voluntarily and willingly waived his *Miranda* rights and his rights to have counsel present and provided a statement to the officers which was reduced to writing[,]" and "[D]efendant's statement should not be excluded as it was made knowingly, voluntarily and willingly after waiving all his constitutional rights related thereto."[5] In denying Defendant's Statement Motions, the trial court made detailed findings of fact concerning the two interviews, made conclusions of law that applied the relevant legal principles to those findings, and explained its rationale. The trial court did not commit reversible error in failing to enter a written order on these motions.

The record reflects that no conflicting evidence was presented in the hearing regarding Defendant's Cell Phone Motion, and Defendant points to none. So the trial court was not required to make any findings of fact. *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. But the trial court made findings anyway, and also made the necessary conclusions of law to deny the motion. The trial court found, among other things, that "[D]efendant handed his phone to [a detective]" and "provided the pass code to the detective[;]" when the detective told Defendant he needed to search it for evidence, "[D]efendant complained about the inconvenience of [police] having his phone and that he needed it but never demanded that it be returned." From these findings, the trial court concluded that

5. *See*, *e.g.*, *State v. Jordan*, 216 N.C. App. 112, 120, 716 S.E.2d 242, 247 n 2 (2011) (noting that whether waiver of *Miranda* rights was intelligently, voluntarily, and knowingly made is a conclusion of law).

"[D]efendant voluntarily provided his phone to the police or to law enforcement[,]" and denied the motion. The trial court provided the necessary rationale for its ruling, including a conclusion from the factual findings that Defendant voluntarily provided police with access to his cell phone.

The trial court also made findings that, at the time Defendant handed his phone to the police, Monje had identified Defendant as a possible suspect, she had identified his Mustang as being present at the crime scene, and Defendant had already made statements to police that he was near the shooting when it occurred. The trial court then made the conclusions of law from these factual findings that "law enforcement had probable cause to seize it *based on the allegations known to them at the time concerning the shooting*[,] . . . that it's reasonable to believe that the phone may contain evidence related to the alleged crime and that it would be proper to preserve it for evidentiary purposes[,]" and "that there was probable cause sufficient to search the phone . . . ." (emphasis added). *Cf. Baskins*, ___ N.C. App. at ___, 786 S.E.2d at 99. In sum, the trial court provided the required rationale for its ruling, found sufficient facts, and applied the law to those findings in rendering conclusions of law.[6] As a result, Defendant's argument as to this motion is overruled.

The trial judge referred to his oral findings and conclusions as "sketch[es] of what [he] would like to include" in any written orders and would have "be[en] happy to consider any proposed findings" offered by the parties. However, nothing in the transcript indicates that the judge had not made up his mind on the findings and conclusions that were rendered aloud; rather, it appears the trial judge was merely giving counsel an opportunity to submit proposed findings and conclusions consistent with those recited orally, as the judge "preserve[d] the right to clarify" his findings and conclusions once proposed written orders were submitted. "A trial court's ruling on an evidentiary point will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect," *State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988) (citation omitted), and "[t]here is a presumption of regularity in the trial. . . . An appellate court is not required to, and

6. Defendant notes that several of the trial court's rulings requested the State to draft orders containing the "customary conclusions of law" or "appropriate conclusions of law, including jurisdiction matters." However, as detailed *supra*, each such statement follows an oral order with conclusions of law sufficient to dispense of each motion to suppress, and therefore any additional "customary conclusions of law" would be unnecessary surplusage.

should not, assume error by the trial judge when none appears in the record before the appellate court." *State v. Phifer*, 290 N.C. 203, 212, 225 S.E.2d 786, 792 (1976) (citation omitted). In light of these presumptions and the explicit findings and conclusions in the transcript before us, we will not construe the trial court's characterization of the same as "sketches" as an intention to enter written orders contrary to the facts found and conclusions reached on the record; nor will we construe its instructions to counsel to do likewise.

b. Admission of the Mustang and Gun Photos

[3] Defendant next argues that the trial court erred in admitting the Mustang and Gun Photos over his objection pursuant to Rules 401, 402, 403 and 404(a)-(b). In reviewing such a decision by a trial court,

> we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). As for determinations of relevancy, those "technically are not discretionary and therefore are not reviewed under the abuse of discretion standard[.]" *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991). They are, however, "given great deference on appeal." *Id.* at 502, 410 S.E.2d at 228 (citation omitted).

Neither this Court nor our Supreme Court appears to have set forth a plain statement of the standard of review applicable to rulings regarding Rule 404(a). However, a survey of appellate decisions applying the Rule shows that such review generally follows a *de novo* standard. *See, e.g.*, *State v. Walston*, 367 N.C. 721, 766 S.E.2d 312 (2014) (reviewing the exclusion of evidence under Rule 404(a)(1) under an apparent *de novo* standard to determine whether the evidence in question fell within the rule or an exception thereto); *State v. Clapp*, 235 N.C. App. 351, 362-63, 761 S.E.2d 710, 718 (2014) (applying a "loose *de novo* standard of review" to the exclusion of witness testimony under Rule 404(a)(1)).

Defendant's argument for exclusion of the Mustang and Gun Photos based on Rules 404(a) and (b) is premised on the assumption that possession of a firearm and flashing gang signs "show[ ] bad character and

bad acts." We fail to see how possession of a firearm is indicative of bad acts or bad character—gun ownership is enshrined in the Second Amendment to the United States Constitution, and we do not believe the exercise of that right indicates a person's poor character. Indeed, Defendant's own brief fails to identify any basis for such a conclusion. As for any purported gang signs, we fail to see how the hand signals in the Mustang Photo indicate gang affiliation in any way. As detailed *supra*, the photo shows two men with four fingers of their left hands extended—a common hand gesture representing the number "4,"—while one man has his right hand in a closed fist with his middle finger extended—a common expression of vulgarity. Nothing in the record suggests that either gesture indicates gang affiliation; besides, the trial judge instructed "the District Attorney's office not to ask any questions about signs or gang affiliation based on this picture." Reviewing the issue *de novo*, we hold that neither the Mustang nor the Gun Photos fall within the ambit of Rule 404 and overrule Defendant's argument on this question.

[4] We likewise reject Defendant's argument that the Mustang and Gun Photos were inadmissible under Rules 401 and 402. Defendant compares this case to our decision in *State v. Godley*, 140 N.C. App. 15, 535 S.E.2d 566 (2000), holding that trial court erred by allowing the State to use a police officer's firearm as a prop to illustrate the defendant's testimony. 140 N.C. App. at 25, 535 S.E.2d at 574. But in *Godley*, no evidence indicated that the gun used by the defendant bore any relation to the prop gun, other than testimony that the defendant's firearm "[c]ould have been a little bigger." *Id.* at 25, 535 S.E.2d at 574 (alteration in original) (internal quotation marks omitted). Here, there is an evidentiary connection between the photos in question, the crime, and the accused—the Gun and Mustang Photos were obtained from Defendant's phone, show he had access to firearms and the Mustang, and depict him at almost the precise location where the shooting took place. One of the gun photos shows Defendant in possession of a firearm resembling that used in the shooting as described by Monje.[7] Because this evidence has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable . . . than it would be

7. Monje told Detective Merritt that she saw a "black and very small" gun at the shooting. Each of the Gun Photos shows a black gun in a person's lap. Defendant asserts that the black firearms in the Gun Photos are entirely dissimilar to the description given by Monje; we disagree, as each photo shows at least one gun that could reasonably be characterized as both black and very small. The degree to which this reasonable characterization of the evidence is credible, probative, and ultimately persuasive is, naturally, a question for the jury.

without the evidence," N.C. Gen. Stat. § 8C-1, Rule 401 (2017), and in appropriate deference to the determination made by the trial court, *Wallace*, 104 N.C. App. at 502, 410 S.E.2d at 228, we hold the trial court did not err in admitting the Gun and Mustang Photos as relevant under Rules 401 and 402.

The trial court also did not abuse its discretion in concluding the Gun and Mustang Photos were not subject to exclusion pursuant to Rule 403. Defendant's briefs pay lip service to Rule 403, but he cites no authority for his argument. Defendant's brief assumes the conclusion that the Mustang and Gun Photos were irrelevant; having held to the contrary, we reject this argument as well. While Defendant's briefing does posit that this evidence was grossly prejudicial, such a contention appears to be made in the context of showing prejudicial error—not in the context of a Rule 403 analysis. Thus, having held that the Mustang and Gun Photos were relevant and admissible under Rules 401, 402, and 404, we hold the trial court did not abuse its discretion in ruling the probative value of this evidence was not outweighed by its potential for undue prejudice.

c. Admission of Monje's In-Court Identification

[5] Defendant's final argument asserts that the trial court erred in denying his ID Motion, arguing that the trial court failed to make any conclusions of law and likewise failed to make three findings concerning: (1) the absence of a completed witness confidence statement at a photo line-up; (2) her inability to choose between a photo of Defendant and another man in the photo line-up; and (3) whether she heard Defendant's name while riding with the police to identify the silver Mustang on the day of the shooting. We reject Defendant's argument.

First, the trial court made conclusions of law, stating at the hearing that "[t]he Court would find that the witness's testimony is admissible. It appears to the Court that it would be appropriate for the jury to determine the credibility of this witness and that there's a sufficient basis for the evidence to go before the jury. I would find that the evidence is relevant. I would find, after considering all the information before the Court at this time, that it would survive the balancing test." As to the findings Defendant contends should have been made, there was no conflict in the evidence concerning a missing eyewitness confidence statement or Monje's inability to pick a single picture in the earlier photo line-up; thus, express factual findings on these issues were not required. *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. Lastly, the trial court could not have made a finding that Monje heard Defendant's name while riding with police, as

no evidence was introduced showing such a fact.[8] Assuming *arguendo* that such evidence was in the record, it is relevant not to the admissibility of Monje's testimony but rather to its credibility—a point conceded by Defendant's counsel at oral argument. Because the credibility of an in-court identification is a question for the jury, *Moses*, 350 N.C. at 767, 517 S.E.2d at 869, Defendant's final argument is overruled.

III. CONCLUSION

Although the prosecutor in this case failed to comply with the requests of the trial court to enter written orders on Defendant's various motions to suppress, this failure does not render the oral findings and conclusions made by the trial court on the record erroneous. The trial court's oral rulings on the motions are without error, because they state sufficient findings of fact resolving any material conflicts in the evidence and conclusions of law that apply the law to those factual findings. Because the record permits us to conduct "meaningful appellate review of the trial judge's decision" under these circumstances, *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674, Defendant's argument to the contrary is rejected. We further hold that the trial court did not err in admitting the Mustang and Gun Photos pursuant to Rules 401, 402, 403, and 404(a)-(b), nor did it err in admitting Monje's in-court identification of Defendant.

NO ERROR.

Judges DILLON and DAVIS concur.

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8. There was some evidence introduced that police discovered Defendant's name from his Mustang's registration once it was identified by Monje, but nothing in the record indicates that Monje was in the vehicle with police, or in a position to overhear police discussing Defendant's name, when that information was shared between police. To the contrary, Monje testified that she did not know Defendant's name when she gave her statement to Detective Merritt—after Monje had identified the Mustang and Defendant's name had been discovered by authorities. She further testified that she first heard Defendant's name when he was arrested. Detective Merritt similarly testified that neither he nor any other officer mentioned Defendant's name to Monje, and that only a description of the Mustang was broadcast by radio. The officer that ran the Mustang's license plate testified that he communicated the plate number over the radio and that other officers could pull up Defendant's name on their onboard computers, but he did not testify that Defendant's name was ever broadcast aloud.

STATE OF NORTH CAROLINA
v.
SHIRLYE CORNELIA GRANDY, DEFENDANT

No. COA18-79

Filed 2 October 2018

Embezzlement—entrustment of funds—supervisor's security device

The State presented sufficient evidence to convict defendant of embezzling funds from her employer where defendant was the director of accounting for a state university foundation and was entrusted with her own security device and her supervisor's security device, both of which were required in order to access the employer's funds. The bank's intent to require two foundation employees to participate in each transaction as a security measure did not negate the fact that defendant's employer entrusted her with its funds and both security devices.

Appeal by defendant from judgment entered 2 October 2017 by Judge Tanya T. Wallace in Superior Court, Guilford County. Heard in the Court of Appeals 22 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Torrey D. Dixon, for the State.

Leslie Rawls, for defendant-appellant.

STROUD, Judge.

Defendant appeals her two convictions for embezzlement. Defendant's sole argument on appeal is that her motion to dismiss the embezzlement charges should have been granted because her employer had not entrusted her with the funds since the employer's bank required two employees jointly to use a security measure provided by the bank to issue checks. Because the evidence showed that defendant's employer had entrusted defendant with both security devices, despite the bank's intention to require participation by two employees, the trial court did not err in denying her motion.

I. Background

The State's evidence showed that defendant was the director of accounting for North Carolina A&T University Foundation, Inc. ("the Foundation"). After a check did not timely clear, other employees in the Foundation began to investigate financial discrepancies. During the investigation, defendant admitted both to other employees and law enforcement that she had transferred money from the Foundation's account into her personal account. The total amount transferred to defendant was $402,402.99. Defendant was tried by a jury, convicted of two counts of embezzlement and one count of corporate malfeasance, and sentenced by the trial court. Defendant appeals.

II. Motion to Dismiss

Defendant makes only one argument on appeal,[1] contending her motion to dismiss the embezzlement charges should have been allowed "because embezzlement requires the accused to have been entrusted with the property taken and the State's evidence showed that [defendant] took the funds by using her supervisor's security device without permission[.]" (Original in all caps).

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

> N.C. Gen. Stat. § 14-90 defines the offense of embezzlement and requires the State to present proof of the following essential elements: (1) that the defendant, being more than 16 years of age, acted as an agent or fiduciary for his principal, (2) that he received money or valuable

1. Defendant does not contest her conviction for corporate malfeasance.

> property of his principal in the course of his employment and by virtue of his fiduciary relationship, and (3) that he fraudulently or knowingly misapplied or converted to his own use such money or valuable property of his principal which he had received in his fiduciary capacity.

State v. Rupe, 109 N.C. App. 601, 608, 428 S.E.2d 480, 485 (1993); *see also* N.C. Gen. Stat. § 14-90 (2017); *State v. Robinson*, 166 N.C. App. 654, 658, 603 S.E.2d 345, 347 (2004) ("To survive a motion to dismiss a charge of embezzlement, the State must have presented evidence of the following: (1) Defendant was the agent of the complainant; (2) pursuant to the terms of his employment he was to receive property of his principal; (3) he received such property in the course of his employment; and (4) knowing it was not his, he either converted it to his own use or fraudulently misapplied it." (citation and quotation marks omitted)).

Defendant's only argument on appeal is that she was not entrusted with the funds in the course of her employment. *See generally Rupe*, 109 N.C. App. at 608, 428 S.E.2d at 485. To access the funds, the employer's bank required defendant to use both her own security device, which they referred to as a "key fob," along with her supervisor's key fob. The bank issued the key fobs to each employee individually, so defendant contends "[n]either the funds nor the key fob was entrusted to [defendant]. Without the property having been entrusted, embezzlement did not occur."

Defendant compares her case to *State v. Weaver*, 359 N.C. 246, 607 S.E.2d 599 (2005). In *Weaver*, our Supreme Court reversed an embezzlement conviction where the defendant-employee took a company signature stamp without her employer's knowledge or permission and used it to write checks to herself:

> The dispositive issue presented for review on direct appeal is whether the lawful possession or control element of the crime of embezzlement was satisfied when an administrative employee took a corporate signature stamp without permission and wrote unauthorized corporate checks, thereby misappropriating funds from her employer. That employee's misappropriation is the basis of defendant's convictions for aiding and abetting embezzlement and conspiracy to embezzle. We conclude that the employee did not lawfully possess or control the misappropriated funds and therefore affirm the decision of the Court of Appeals which reversed defendant's convictions.

359 N.C. at 247, 607 S.E.2d at 599. Defendant argues a key fob is the modern-day equivalent of a signature stamp, so the State did not meet the elements of embezzlement. *See id.*

However, the facts of *Weaver* are different from this case, because the employer in *Weaver* had not authorized the defendant to write checks or to use the signature stamp. *Id.* The Court in *Weaver* explained,

> In the instant case, it is undisputed that [defendant] had no independent authority to write checks from R & D accounts or to use Shirley Weaver's signature stamp. In fact, both [defendant] and Shirley Weaver testified that direct authorization from Shirley was required before [defendant] wrote each individual check. Although the record is unclear as to the exact location of each check used to misappropriate the company funds, the record indicates that the signature stamp was kept in a desk drawer in Shirley Weaver's office and that [defendant] could not access this stamp without Shirley Weaver's direct permission. While [defendant] had access to the checks and signature stamp by virtue of her status as an employee at R & D and International Color, we cannot say, based on these facts, that [defendant's] possession of this property was lawful nor are we persuaded that this property was under [defendant's] care and control as required by N.C.G.S. § 14-90. Because [defendant] never lawfully "possessed" the misappropriated funds and because the funds were not "under [her] care" we conclude that [defendant] did not commit the crime of embezzlement as defined in N.C.G.S. § 14-90.

Weaver, 359 N.C. at 256, 607 S.E.2d at 605 (emphasis omitted); *see also State v. Palmer*, 175 N.C. App. 208, 213, 622 S.E.2d 676, 680 (2005) ("In this case, like in *Keyes* and *Weaver*, Defendant never took lawful possession of the incoming checks, nor was she entrusted with the checks by virtue of a fiduciary capacity." (emphasis omitted)).

Defendant ignores the fact that here, unlike in *Weaver*, *Palmer*, and *Keyes* –all cases she cited–her employer, the Foundation, *entrusted* her with both its funds and both key fobs, even if the bank intended otherwise. *Cf. Weaver*, 359 N.C. at 256, 607 S.E.2d at 605; *Palmer*, 175 N.C. App. at 213; 622 S.E.2d at 680; *State v. Keyes*, 64 N.C. App. 529, 532, 307 S.E.2d 820, 823 (1983) ("Here, [neither defendant] received, took lawful possession of, or were entrusted with components by virtue of

a fiduciary capacity."). Defendant had "lawful possession or control" of both her own key fob and her supervisor's key fob. Defendant kept both fobs during the course of her employment as the director of accounting from approximately 2008 to 2014 and she routinely wrote checks using both fobs.[2] Although the *bank* intended for two employees to participate in each transaction as a security measure, the Foundation did not require its employees to use the key fobs as the bank intended. Instead, the Foundation "entrusted" the entire process to defendant. The former executive director of the Foundation testified that defendant's duties included "[p]rocessing checks and depositing them and overseeing finances and payroll and things like that." Defendant's supervisor was also entrusted with the funds and there was a dual security measure in place, but the evidence showed that the Foundation had entrusted defendant with such funds; exclusivity of the entrustment is not an element of the crime. *See* N.C. Gen. Stat. § 14-90. Therefore, the trial court did not err in denying defendant's motion to dismiss. This argument is overruled.

III. Conclusion

We conclude there was no error.

NO ERROR.

Judges ZACHARY and MURPHY concur.

2. The evidence does not show the exact dates the Foundation opened the relevant bank accounts or when the bank issued the key fobs, but it does tend to show the Foundation allowed defendant to handle financial transactions in this manner for an extended time period prior to 2011 and 2014, when transactions for which defendant was charged with embezzlement occurred.

STATE v. ISAACS

[261 N.C. App. 696 (2018)]

STATE OF NORTH CAROLINA
v.
DEBBY ROMINGER ISAACS, Defendant. and FRANCISCO Q. TAVLAVERA, Bail Agent, UNITED STATES SURETY COMPANY, Surety Company and WATAUGA COUNTY BOARD OF EDUCATION, Judgment Creditor

No. COA17-1397

Filed 2 October 2018

1. Sureties—motion to set aside bond forfeiture—judicial notice—material not attached to motion

In a proceeding to set aside a bond forfeiture, the trial court did not abuse its discretion by taking judicial notice of the order to arrest defendant even though the surety failed to attach the order to its motion, because the arrest order was beyond reasonable controversy and part of the history of the case.

2. Sureties—motion to set aside bond forfeiture—amendment—outside of statutory motion period

In a proceeding to set aside a bond forfeiture, the trial court did not err in allowing a surety to amend its motion by attaching the order to arrest defendant, even though the statutory 150-day period had expired, because the rules of civil procedure authorize trial courts to use their discretion to liberally allow pleading amendments, and the opposing party failed to show how allowing the amendment to include undisputed facts would cause material prejudice.

Appeal by the Watauga County Board of Education from order entered 4 August 2017 by Judge Theodore W. McEntire in Watauga County District Court. Heard in the Court of Appeals 23 August 2018.

Miller & Johnson, PLLC, by Nathan A. Miller, for appellant Watauga County Board of Education.

Brian D. Elston for appellee United States Surety Company.

TYSON, Judge.

The Watauga County Board of Education (the "Board") appeals from an order allowing the United States Surety Company's ("Surety") motion to set aside a bond forfeiture. We affirm.

I. Background

Debby Rominger Isaacs ("Defendant") failed to appear for her scheduled court date in Watauga County District Court on 6 December 2016. The court issued an order for her arrest. The Watauga County Clerk of Court issued a bond forfeiture notice in the amount of $10,000 to Defendant, Surety, and Surety's bail agent on 9 December 2016. Notice was mailed to all parties the same day. Surety served the order for arrest and surrendered Defendant to the Watauga County sheriff on 2 May 2017.

Surety's bail agent timely filed a motion to set aside the bond forfeiture on 8 May 2017, 150 days after forfeiture notice. Form AOC-CR-213, the preprinted form used for motions to set aside, lists seven reasons, pursuant to N.C. Gen. Stat. §15A-544.5, for which a bond forfeiture may be set aside, with corresponding boxes for a movant to mark the alleged basis or grounds for setting aside the forfeiture. In the present case, the motion to set aside filed by Surety's bail agent indicated reason number four, N.C. Gen. Stat. §15A-544.5(b)(4), that Defendant had been served with an order for arrest for the failure to appear on the bonded criminal charge, as evidenced by a copy of an official court record including an electronic record.

However, attached to Surety's motion to set aside was the warrant for Defendant's initial arrest, dated 21 September 2016, rather than the order for arrest for Defendant's failure to appear, served on 2 May 2017. The Board objected to the motion to set aside. A hearing was set for 25 May 2017, 167 days after notice of forfeiture.

At the hearing, Surety submitted a handwritten motion to amend its motion to set aside, including what turned out to be an incomplete copy of the 2 May 2017 order for arrest without the certificate of service. Surety's amended motion sought to include N.C. Gen. Stat. §15A-544.5(b)(3) as an additional reason to set aside forfeiture evidenced by a copy of Defendant's surrender to the sheriff, dated 2 May 2017. Surety then orally moved to amend its amended motion to set aside, in order to include the complete copy of the order for arrest served on 2 May 2017.

The trial court was concerned about the wrong documentation being attached, and the amended motion with supplemental information, being filed the morning of the hearing. The trial court allowed Surety 15 days to supplement and for the Board to object and request a new hearing. The trial court found there had "been no justification or excuse for [Surety] filing the wrong form, and that the [Board] filed the good faith objection" and the Board had incurred both fees and extra

time in this matter because of a "completely willful error" by Surety. Surety's counsel indicated Surety would pay for the Board's fees for that hearing.

The Board's counsel indicated that after the 15 day period to supplement, the Board would not be able to object and would not waste time requesting a new hearing. Instead, counsel indicated the Board's intention to appeal and requested the trial court to issue its ruling on the bond motion. The trial court found Defendant had been served with an order for arrest, evidenced by a copy of an official court record, the Surety had cited a correct statutory reason to set aside the forfeiture, and took judicial notice of the file as evidence to show Defendant was served with the order of arrest.

The trial court filed a written order on 4 August 2017, which granted Surety's motion to set aside on the grounds that "one of the statutory grounds is satisfied as Defendant was arrested on an order for arrest prior to the final judgment date of May 8, 2017." The order indicated the "conclusions of law dispose[d] of the matter and [did] not reach Surety's motion to amend[,]" but also granted Surety's motion to amend. The Board appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-544.5(h) (2017).

III. Issues

The Board argues the trial court erred when it considered matters outside the filed motion and took judicial notice of Defendant's later arrest warrant. The Board also argues the trial court erred when it allowed an amendment and evidence presented after the final forfeiture date.

IV. Standards of Review

"In an appeal from an order setting aside a bond forfeiture, the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Knight*, __ N.C. App. __, __, 805 S.E.2d 751, 753 (2017) (citation and internal quotation marks omitted). "[T]he standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion. An abuse of discretion will be found only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *Brown*

v. City of Winston-Salem, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006) (citations and internal quotation marks omitted).

V. Analysis

A. Bond Forfeiture

Following a bonded defendant's failure to appear, "the court shall enter a forfeiture . . . against each surety on the bail bond." N.C. Gen. Stat. § 15A-544.3(a) (2017). The court must give written notice of this entry of forfeiture to the defendant and any surety listed on the bail bond, to be delivered via first-class mail. N.C. Gen. Stat. § 15A-544.4 (2017). This notice requirement triggers a 150-day period in which the defendant, "any surety," a "professional bondsman or runner acting on behalf of a professional bondsman," or a "bail agent acting on behalf of an insurance company" may file a written motion to set aside the forfeiture. N.C. Gen. Stat. § 15A-544.5(d) (2017).

Bond forfeiture will only be set aside for compliance with one of seven statutorily enumerated reasons. Each of the seven reasons requires proof. The statute provides, in relevant part:

> (3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, *as evidenced by* the sheriff's receipt provided for in that section.
>
> (4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question *as evidenced by* a copy of an official court record, including an electronic record.

N.C. Gen. Stat. § 15A-544.5(b)(3)-(4) (2017) (emphasis supplied).

The board of education may object to the motion to set aside, and when such a written objection is filed, a hearing on the motion will be held within 30 days. N.C. Gen. Stat. § 15A-544.5(d)(5).

B. Judicial Notice

[1] The Board argues the trial court erred in considering matters outside the filed notice and taking judicial notice of the file as evidence Defendant was served with the order of arrest. We disagree.

"A court may take judicial notice, whether requested or not." N.C. Gen. Stat. § 8C-1, Rule 201(c) (2017). Rule 201 only applies to "adjudicative facts." *Id.* "With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy." N.C. Gen. Stat. § 8C-1, Rule 201 advisory committee note.

"A trial court may take judicial notice of earlier proceedings in the same cause," including matters in the file not offered into evidence. *See In re Isenhour*, 101 N.C. App. 550, 552-53, 400 S.E.2d 71, 72-73 (1991) (finding the trial court did not err when it made "plain that it had reviewed the file and was considering the history of the case in conducting the hearing" and "[n]either party was required to offer the file into evidence"); *see also* Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 26 (7th ed.) ("there also seems little reason why a court should not notice its own records in any prior or contemporary case when the matter noticed has relevance").

Here, the trial court took judicial notice of a fact "beyond reasonable controversy." It is undisputed that Defendant was served with an order of arrest on 2 May 2017, prior to the 150-day statutory deadline. The trial court attached the 2 May 2017 order of arrest as an exhibit to the court's order. Counsel for the Board acknowledged that with the inclusion of the entire 2 May 2017 order of arrest, the Board would have no grounds to object to Surety's motion to set aside the bond forfeiture.

The trial court did not abuse its discretion when it admitted the 2 May 2017 order for arrest into the record. The Board's argument is overruled.

C. Motion to Amend

[2] The Board contends the trial court committed reversible error by granting Surety's motion to amend and allowing Surety to attach the appropriate order for arrest after the expiration of the 150-day period. We disagree.

"[A] bond forfeiture proceeding, while ancillary to the underlying criminal proceeding, is a civil matter[,]" and the rules of civil procedure apply. *State ex rel. Moore Cty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005). "Under Rule 15(a) of the North Carolina Rules of Civil Procedure, leave to amend a pleading shall be freely given except where the party objecting can show material prejudice by the granting of a motion to amend." *Martin v. Hare*, 78 N.C. App. 358, 360, 337 S.E.2d 632, 634 (1985) (citation omitted). This liberal policy for amendment supports "the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities." *Mangum v. Surles*, 281 N.C. 91, 99, 187 S.E.2d 697, 702 (1972).

"A motion to amend is addressed to the discretion of the trial court." *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). "The party opposing the amendment has the burden to establish that it would

be prejudiced by the amendment." *Carter v. Rockingham Cty. Bd. of Educ.*, 158 N.C. App. 687, 690, 582 S.E.2d 69, 72 (2003) (citation omitted). "Rulings on motions to amend after the expiration of the statutory period are within the discretion of the trial court[.]" *Lee v. Keck*, 68 N.C. App. 320, 326, 315 S.E.2d 323, 328 (1984).

The Board argues that allowing an amendment after the expiration of the 150-day statutory period to challenge would cause undue prejudice to the Board and cites to an unpublished opinion of this Court for support. In *State v. Cook*, the sureties filed a motion to set aside forfeiture, but failed to attach the order for arrest supporting the motion. 228 N.C. App. 360, 748 S.E.2d 775, 2013 WL 3776968 at *1 (unpublished). The board of education filed an objection, and the sureties filed an amended motion with the required documentation. *Id.*

Because the "amendment was filed prior to the hearing on sureties' motion and within the statutory time limit pursuant to N.C. Gen. Stat. § 15A-544.5(d)(1)," it prevented "any unfair prejudice" to the board of education. *Id.* at *3. This Court did not address the issue of whether a motion to set aside filed within the statutory period could be amended after the expiration of the 150 days. *Id.* at *3, n.1.

The Board argues that to allow an amendment to the motion after the statutory time period creates undue prejudice because a school board "can no longer rely on the time limit as set forth by the General Assembly." Further, when a school board files an objection it "expends precious and limited tax payer funds . . . in anticipation . . . that [it] will prevail because the [s]urety filed a faulty motion and the statutory time period has passed."

By its own admission, the only prejudice the Board faced as a result of the trial court allowing the amendment was the added time of its attorney. In this case, recognizing the possible harm and cost to the Board, Surety offered to pay the Board's attorney's fees incurred for the hearing. Surety's offer was consistent with the statutory remedy available in this instance:

> If at the hearing [to set aside forfeiture] the court determines that the . . . documentation required to be attached . . . was not attached to the motion at the time the motion was filed, the court may order monetary sanctions against the surety filing the motion, unless the court also finds that the failure . . . to attach the required documentation was unintentional.

N.C. Gen. Stat. 15A-544.5(d)(8) (2017). Although the Board did not request the trial court impose sanctions, this statutory provision indicates the General Assembly's intent to allow the trial court discretion to resolve such missteps, and that Surety's errors did not as a matter of law preclude it from obtaining relief.

The Board's position to not allow an amendment tends to contradict the intended policy of the bond system: "[t]he goal . . . is the production of the defendant, not increased revenues for the county school fund." *State v. Locklear*, 42 N.C. App. 486, 489, 256 S.E.2d 830, 832 (1979). The Board's arguments are overruled.

VI. Conclusion

When the motion to set aside cites to at least one statutory reason, supported by evidence, the trial court must grant the motion. N.C. Gen. Stat. §15A-544.5(a, b) ("a forfeiture *shall* be set aside for any one of the following reasons" (emphasis supplied)). The record contains competent evidence to support the trial court's granting of Surety's motion to set aside.

As part of its ruling, the trial court correctly expressed reservations about the last minute substitution of the timely order for arrest and receipt of the surrender of Defendant to the sheriff. We agree sanctions would have been appropriate if Surety had not attempted to remediate its own initial failings, or if the Board had not accepted the Surety's offer of attorney's fees as a sanction. However, under these facts, the Board has failed to show any prejudice or that the trial court abused the discretion given to it under the North Carolina Rules of Evidence, North Carolina Rules of Civil Procedure, and the express provisions of the statute itself.

The Board has failed to show the trial court abused its discretion in taking judicial notice of the court's file and of the timely and appropriate order for arrest and surrender of Defendant. *See In re Isenhour*, 101 N.C. App. at 552-53, 400 S.E.2d at 72-73. Whether to allow Surety's motion to amend under Rule 15 also rested within the trial court's discretion.

The Board failed to show how allowing the amendment to include undisputed facts in the court file caused "material prejudice." *See Martin*, 78 N.C. App. at 360, 337 S.E.2d at 634. The trial court's ruling is affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and BERGER concur.

STATE OF NORTH CAROLINA
v.
BERTIE DELVON LATEZ McQUEEN

No. COA17-1415

Filed 2 October 2018

1. Constitutional Law—effective assistance of counsel—principal State's witness—alleged failure to expose existence of immunity deal

In a prosecution for murder and robbery, defendant's trial counsel was not ineffective for failing to ensure the jury was informed that the principal witness against defendant could have been charged with first-degree murder based on felony murder but was not. Although defendant believed the witness's testimony was secured through an immunity agreement and that the witness received something of value in exchange for his testimony which affected his credibility, there was no evidence of such an agreement. Further, defense counsel attempted to elicit information about a deal and requested related jury instructions.

2. Appeal and Error—preservation of issues—due process—prosecutorial misconduct

In a prosecution for murder and robbery, defendant failed to preserve for appellate review arguments that the prosecutor failed to correct incorrect testimony, elicited incorrect testimony, and recited the law incorrectly in closing argument, because he did not raise these issues at trial.

Appeal by defendant from judgment entered 25 January 2017 by Judge V. Bradford Long in Guilford County Superior Court. Heard in the Court of Appeals 22 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ann W. Matthews, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant.

ELMORE, Judge.

Defendant Bertie Delvon Latez McQueen appeals from judgment entered upon jury verdicts finding him guilty of second degree murder

and armed robbery. On appeal, defendant argues his trial counsel was ineffective by failing to ensure the jury knew that the State's key witness could have been charged with first degree murder in the case, but was not. Defendant further contends he was denied a fair trial when the prosecutor failed to correct incorrect testimony, actively elicited incorrect testimony, and recited the law incorrectly in her closing argument.

For the reasons stated herein, we conclude that defendant received effective assistance of counsel as well as a fair trial, free from error.

I. Background

On 18 November 2013, a grand jury indicted defendant for the 2 July 2013 shooting death and robbery of Derrick Rogers ("the victim"). Defendant presented no evidence at trial, while the State's evidence relevant to the issues on appeal tended to show the following.

Damon Bell testified that on 2 July 2013, defendant called him to buy a quarter pound of marijuana. With the marijuana in tow, Bell drove a white Cadillac to pick defendant up from his apartment, and the two proceeded to drive to a different apartment complex at defendant's instruction. Defendant told Bell where to park upon arriving at the complex, and the victim entered the back passenger side of the vehicle and sat behind defendant, who then handed the victim the marijuana.

The victim examined the marijuana, said he liked its quality, requested a half pound instead of a quarter pound, and handed it back to defendant. According to Bell, defendant then pulled out a gun; said, "Look at my new rack"; and shot the victim once in the chest. Bell had never seen the gun before and said to defendant, "Excuse me? What the f*** was that?" Defendant responded by pointing the gun at Bell and instructing him to drive to another apartment complex.

When they arrived at that complex, Bell stayed in the vehicle while defendant pulled the victim out of the back seat and onto the ground. Defendant then re-entered the vehicle and told Bell to drop him off at a nearby housing development. Bell testified that when defendant eventually exited the vehicle, he was holding the victim's chain necklace. Bell went home and did not call the police.

In November 2013, Bell was arrested for accessory after the fact to first degree murder and given a secured bond. Two months later, his bond was changed to $275,000.00 unsecured. Bell testified that he did not consider the lack of a murder charge against him or being released on house arrest for the three years prior to defendant's trial to be a "deal" with the State. On direct examination, the prosecutor specifically

asked Bell, "What if anything have you been offered in exchange for your testimony?," to which Bell responded, "Nothing." Defense counsel nevertheless pursued the issue on cross-examination:

> Q: Eventually there was a consent order to get [you] out of jail, wasn't there?
>
> A: Yep.
>
> . . . .
>
> Q: You walked right out the door, didn't you?
>
> A: Absolutely.
>
> Q: And that was part of your deal for testifying, wasn't it?
>
> A: I have no deal.

Detective Mike Matthews of the Greensboro Police Department testified to interviewing Bell prior to his arrest for accessory after the fact. While Bell had initially denied knowing defendant or recognizing the victim, he ultimately gave Detective Matthews a version of events consistent with Bell's testimony at defendant's trial.

On cross-examination by defense counsel, Detective Matthews testified to his understanding that Bell was not "eligible for the felony murder rule" and could not be arrested for first degree murder because Bell "did not know there was going to be somebody lose [sic] their life to do this narcotics transaction." Detective Matthews went on to state, "And I may be wrong, not a lawyer, but my knowledge of the felony murder rule would not include selling drugs." The issue was addressed again on re-direct examination by the prosecutor:

> Q: Just briefly I want to talk about this felony murder. Isn't it usually a dangerous felony that has to have occurred like a robbery with a dangerous weapon?
>
> A: Yes, ma'am. There's a list of felonies. I don't exactly have the list memorized, but there's a list. Yes, ma'am.
>
> Q: In order to charge Mr. Bell with felony murder, wouldn't you have to have some evidence that he knew a robbery was going to take place?
>
> A: That would be correct.

In her closing argument, the prosecutor generally addressed the law of first degree murder in North Carolina. She argued that the evidence

at trial showed premeditation and deliberation on the part of defendant, which she described as "the first way to get to first degree murder[.]" The prosecutor continued by asserting that the second way

> is called the felony murder rule. There's been some discussion about that. If you engage in what's called an inherently dangerous felony, . . . the law presumes it's foreseeable that someone could die during the commission of one of those felonies. So, if that happens, you're guilty of felony murder. And there's been some discussion about Mr. Bell's charges. . . . . I have signed an indictment. So if you don't like what Bell got charged with, it's on me. Doesn't excuse him, and it doesn't let him get away with murder. I would have to have some evidence that Bell knew the defendant had a gun in order to charge him with felony murder, and I don't have that.

The prosecutor then returned her argument to defendant, stating to the jury that "if you believe, based on the evidence that the defendant wanted to rob [the victim], or did rob [the victim], and [the victim] got killed as a result of that robbery with the gun, then the defendant is guilty of felony murder."

The jury returned verdicts finding defendant guilty of second degree murder and armed robbery. Defendant appeals.

II. Discussion

On appeal, defendant first contends his trial counsel was ineffective by failing to ensure the jury was informed that Bell could have been charged with first degree murder based on the felony murder rule, but was not. Defendant also argues that he was denied a fair trial when the prosecutor failed to correct incorrect testimony, actively elicited incorrect testimony, and recited the law incorrectly in her closing argument.

As an initial matter, we note that defendant concedes he did not enter timely notice of appeal and has therefore petitioned this Court for a writ of certiorari. Because the infirmity is technical in nature, and because the State does not oppose the petition, we exercise our discretion to issue a writ of certiorari and address the merits of defendant's appeal.

A. Ineffective Assistance of Counsel

[1] According to defendant, his trial counsel "was ineffective for failing to make sure the jury knew that Damon Bell could have been charged with first[ ]degree murder." He specifically contends that counsel "did

not come to court armed with pertinent case law that could have been used to correct inaccuracies [about the felony murder rule] in Detective Matthews' testimony and the prosecutor's closing argument."

i. Standard of review

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citation omitted). To meet this burden, the defendant must first show

> that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 562, 324 S.E.2d at 248 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). "The question becomes whether a reasonable probability exists that, absent counsel's deficient performance, the result of the proceeding would have been different." *State v. Moorman*, 320 N.C. 387, 398, 358 S.E.2d 502, 510 (1987) (citing *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068).

ii. Analysis

The only act or omission raised by defendant as evidence of ineffective assistance of counsel is his trial counsel's failure to ensure that the jury knew Bell could have been charged with first degree murder in the case, but was not. Defendant specifically identifies four instances in which counsel failed to correct inaccuracies about the felony murder rule in Detective Matthews's testimony as well as the prosecutor's closing argument, and he remains seemingly convinced that Bell's testimony was the result of a deal or immunity agreement with the State that the jury should have been informed about. We disagree.

Prior to the testimony of a witness under a grant of immunity by the State, the trial court "*must* inform the jury of the grant of immunity and the order to testify[.]" N.C. Gen. Stat. § 15A-1052(c) (2017) (emphasis added). Additionally, "the judge *must* instruct the jury as in the case of interested witnesses" during the jury charge. *Id.* (emphasis added). In considering the mandate of N.C. Gen. Stat. § 15A-1052(c), our Supreme

Court has noted that "[o]bviously, the legislature intended for the jury to know the witness was receiving something of value in exchange for his testimony which might bear on his credibility." *State v. Hardy*, 293 N.C. 105, 120, 235 S.E.2d 828, 837 (1977).

Additionally, even if the witness is not testifying under a grant of immunity, N.C. Gen. Stat. § 15A-1054 provides that

> (a) . . . a prosecutor, when the interest of justice requires, may exercise his discretion not to try any suspect for offenses believed to have been committed . . . , to agree to charge reductions, or to agree to recommend sentence concessions, upon the understanding or agreement that the suspect will provide truthful testimony in one or more criminal proceedings.
>
> . . . .
>
> (c) When a prosecutor enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be provided to defense counsel . . . a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify.

N.C. Gen. Stat. § 15A-1054 (2017).

Similar to the mandate of N.C. Gen. Stat. § 15A-1052(c), the prosecutor's obligation to disclose an arrangement made with a witness pursuant to N.C. Gen. Stat. § 15A-1054 does not depend upon a request by defense counsel. *State v. Lowery*, 318 N.C. 54, 62, 347 S.E.2d 729, 735 (1986). However, the statute requires disclosure only when an arrangement has in fact been reached. *State v. Howell*, 59 N.C. App. 184, 187, 296 S.E.2d 321, 322 (1982).

In asserting that his trial counsel was ineffective, defendant essentially argues he suffered prejudice because the jury did not know Bell "was receiving something of value in exchange for his testimony which might bear on his credibility." *Hardy*, 293 N.C. at 120, 235 S.E.2d at 837. However, counsel repeatedly attempted to elicit that information on cross-examination of both Bell and Detective Matthews. Moreover, during the charge conference, counsel requested that the trial court instruct the jury on the testimony of a witness with immunity or quasi immunity. Counsel argued that because the State could have charged Bell with first degree murder, but instead charged him with the lesser

offense of accessory after the fact, Bell had "received some sentencing concessions already."

In response to defense counsel's argument, the prosecutor adamantly maintained that there had been no discussions with Bell or his attorney related to him testifying in exchange for immunity, a reduction in sentencing, or any other concession that might undermine Bell's credibility as a witness. The trial court agreed, noting "there's been no evidence of a grant of immunity or quasi immunity," and denied defense counsel's request for that instruction. The court went on to state that it would instruct the jury on the testimony of interested witnesses as well as accomplice testimony, which it believed would "cover the interest of Mr. Bell in this case."

iii. Conclusion

Although defendant's trial counsel attempted to elicit testimony regarding a deal between Bell and the State, and requested a jury instruction on the testimony of a witness with immunity, the record reveals that no such deal or immunity agreement existed. Moreover, had there been evidence of an immunity agreement between Bell and the State, the trial court would have been required by N.C. Gen. Stat. § 15A-1052(c) to inform the jury of that agreement. Similarly, had there been evidence of an alternative arrangement between Bell and the State, the prosecutor would have been required by N.C. Gen. Stat. § 15A-1054(c) to provide defense counsel with written notice fully disclosing the terms of that arrangement.

On appeal, defendant does not contend that the trial court violated N.C. Gen. Stat. § 15A-1052(c) or that the prosecutor violated N.C. Gen. Stat. § 15A-1054(c), but argues instead that his trial counsel was ineffective by failing to correct inaccuracies about the felony murder rule such that the jury did not know Bell could have been charged with first degree murder. However, where there is no evidence that the witness received anything of value in exchange for his testimony at defendant's trial, we cannot conclude that defense counsel's performance which included persistent attempts to elicit that information and have the court instruct the jury accordingly amounted to ineffective assistance of counsel. This assignment of error is thus overruled.

B. Due Process and Prosecutorial Misconduct

[2] In his second and final argument on appeal, defendant contends "the prosecutor allowed Detective Matthews to falsely testify on recross-examination that Bell could not have been charged with first[ ]degree

murder; elicited similar testimony with leading questions on redirect examination of Matthews; and cemented the falsehood in the jurors' minds by stating it in her closing argument." According to defendant, the prosecutor's actions deprived him of a fair trial in violation of the Fourteenth Amendment to the United States Constitution as well as Article I, Section 19 of the North Carolina Constitution.

Defendant concedes that he did not raise this constitutional argument before the trial court. "It is well-established that '[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.' " *State v. Moore*, 185 N.C. App. 257, 265, 648 S.E.2d 288, 294 (2007) (quoting *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001)). Thus, defendant has failed to preserve this issue for appellate review.

III. Conclusion

Because defendant's trial counsel's alleged failure to ensure that the jury knew the State's key witness could have been charged with first degree murder did not amount to ineffective assistance of counsel, and because defendant has failed to preserve his constitutional argument for appellate review, we find no error occurring at the trial court.

NO ERROR.

Judges DILLON and DAVIS concur.

STATE OF NORTH CAROLINA
v.
SHELLEY ANNE OSBORNE

No. COA18-9

Filed 2 October 2018

1. Drugs—possession of heroin—identification of substance—sufficiency of evidence

The State failed to present sufficient evidence to prove defendant possessed heroin even though defendant told an investigating officer that she had ingested heroin, several investigating officers identified the substance seized in defendant's hotel room as heroin, a field test of the substance was positive for heroin, and drug paraphernalia typically used for heroin was found in the hotel room.

Without evidence that a scientifically valid chemical analysis was performed to identify the seized substance as heroin, the State did not meet its burden of proof beyond a reasonable doubt.

2. Child Abuse, Dependency, and Neglect—misdemeanor child abuse—heroin use in presence of children—sufficiency of evidence

Although the State failed to prove a rock-like substance seized from defendant's hotel room was heroin so as to support a possession of heroin conviction, the trial court properly denied defendant's motion to dismiss a related charge of misdemeanor child abuse on the basis that she used heroin in the presence of her children. That charge did not require the State to prove the seized substance was heroin; evidence that defendant was found unconscious from an apparent drug overdose, her admission that she used heroin, and the presence of drug paraphernalia consistent with heroin use in the hotel room occupied by defendant and her children was sufficient to submit the charge to the jury.

Appeal by defendant from judgments entered 21 February 2018 by Judge Edwin G. Wilson Jr. in Randolph County Superior Court. Heard in the Court of Appeals 20 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alesia Balshakova, for the State.

Meghan Adelle Jones for defendant.

DIETZ, Judge.

Defendant Shelley Anne Osborne appeals her conviction for possession of heroin. Law enforcement found Osborne unconscious in a hotel room and, after emergency responders revived her, she admitted she used heroin. Officers searched the hotel room and found syringes, spoons with burn marks and residue, and a rock-like substance.

The State did not have the substance tested using a scientifically valid chemical analysis. Instead, at trial the State relied on Osborne's statement to officers that she used heroin, as well as officers' descriptions of the rock-like substance and the results of field tests on the substance, including one performed in open court.

As explained below, the State's evidence was insufficient to survive a motion to dismiss. The State relies on a series of Supreme Court cases,

later synthesized in this Court's decision in *State v. Bridges*, __ N.C. App. __, 810 S.E.2d 365 (2018), concerning the defendant's own identification of the seized substance. Here, by contrast, Osborne never identified the seized substance as heroin—she told officers only that she had used heroin before losing consciousness. Although the State's evidence strongly suggests the seized substance was heroin, that evidence was not enough "to establish the identity of the controlled substance beyond a reasonable doubt" and thus the State was required to present "some form of scientifically valid chemical analysis" to survive a motion to dismiss. *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010). Because the State acknowledges that it did not present any scientifically valid chemical analysis at trial, we vacate the trial court's judgment on this count.

Facts and Procedural History

On 17 November 2014, police responded to a call about a possible overdose in a hotel room. After arriving at the hotel room, officers found Defendant Shelley Anne Osborne in the bathroom. She was unconscious, unresponsive, and turning blue. Osborne regained consciousness after emergency responders arrived and administered an anti-overdose drug. When Osborne regained consciousness, she told an officer that she "had ingested heroin."

The responding officers searched the hotel room and found Osborne's two children, who were around four or five years old. The officers also found multiple syringes, spoons with burn marks and residue on them, and a rock-like substance that appeared to be heroin. An officer conducted a field test on the rock-like substance, which yielded a "bluish color," indicating a "positive reading for heroin."

On 14 September 2015, the State indicted Osborne for possession of heroin and two counts of misdemeanor child abuse. At trial, one of the responding officers testified about discovering Osborne unconscious in the hotel room and her admission that she had used heroin. The officer also described the rock-like substance, including how it resembled heroin; explained the results of the field test indicating the substance was heroin; and discussed how other objects found in the hotel room, including the syringes and spoons, were common paraphernalia used to inject heroin. The officer also performed a field test on the substance seized from the hotel room in open court and displayed the results, which indicated the substance was heroin, to the jury. Osborne did not object to the in-court field test. Osborne also did not present any evidence in her defense. She moved to dismiss the charges at the close of the evidence. The trial court denied the motion.

The jury convicted Osborne on all charges, and the trial court sentenced her to 6 to 17 months in prison for possession of heroin and a consecutive sentence of 60 days for the two counts of misdemeanor child abuse. The trial court suspended both sentences. Osborne appealed.

Analysis

[1] Osborne argues that the trial court erred in denying her motion to dismiss the possession of heroin charge because the State failed to present sufficient evidence that the seized substance was heroin. As explained below, we agree that the evidence presented was insufficient but recognize that this issue is unsettled and may merit further review in our Supreme Court.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980).

In a drug possession case, "the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution." *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010). "Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." *Id.*

The State concedes that, other than the field tests conducted by the arresting officers, the State did not conduct any forensic analysis that identified the rock-like substance seized from Osborne's hotel room as heroin. The State also concedes—or, at least, does not dispute—that the field tests officers conducted at the scene and later at trial are not scientifically valid chemical analyses sufficient to support a conviction.

Instead, the State argues that this case is controlled by a line of decisions from our Supreme Court involving the defendant's identification of the controlled substance. First, in *State v. Nabors*, 365 N.C. 306, 718 S.E.2d 623 (2011), and *State v. Williams*, 367 N.C. 64, 744 S.E.2d 125 (2013), the Supreme Court held that a defense witness's in-court

testimony identifying a substance as cocaine was sufficient to overcome a motion to dismiss even in the absence of forensic analysis. Then, in *State v. Ortiz-Zape*, 367 N.C. 1, 743 S.E.2d 156 (2013), the Supreme Court held that an officer's testimony concerning the defendant's out-of-court identification of the substance as cocaine, combined with the officer's own testimony that the substance appeared to be cocaine, was sufficient to survive a motion to dismiss.

Recently, this Court attempted to synthesize this line of cases into a coherent rule of law. *State v. Bridges*, __ N.C. App. __, 810 S.E.2d 365 (2018). In *Bridges*, the defendant told a law enforcement officer that she had "a bagg[ie] of meth hidden in her bra," and the officer then found a "meth-like" substance in a baggie in the defendant's bra. *Id.* at __, 810 S.E.2d at 366. At trial, the officer described the defendant's statements and the discovery of the baggie. *Id.* We held that "the arresting officer's testimony offered without objection during the State's evidence" was sufficient to meet the State's burden of proof and send the issue to the jury. *Id.* at __, 810 S.E.2d at 367–68.

The State argues that this case is controlled by *Bridges* but there is a key factual distinction between this case and the *Bridges* line of cases. In all of the earlier cases—*Nabors*, *Williams*, *Ortiz-Zape*, and *Bridges*—the defendants' statements (or those of another defense witness) identified the substance seized by law enforcement as a controlled substance. Here, by contrast, Osborne did not identify the seized substance as heroin. Instead, after officers discovered her unconscious in a hotel room and emergency responders administered an anti-overdose medication to revive her, Osborne told the officers that she had ingested heroin. The officers independently searched the hotel room and recovered drug paraphernalia and a rock-like substance believed to be heroin.

We are reluctant to further expand the *Bridges* holding to apply in cases where the defendant did not actually identify the seized substance. To be sure, the State's evidence strongly suggests the seized substance was heroin—Osborne admitted she used heroin, there was drug paraphernalia in the hotel room consistent with heroin use, the rock-like substance found in the hotel room matched the general description of heroin, and a field test indicated the substance was heroin.

But the question is not whether the State's evidence was strong, but whether that evidence "establish[ed] the identity of the controlled substance beyond a reasonable doubt," thus eliminating the need for a scientifically valid chemical analysis. *Ward*, 364 N.C. at 147, 694 S.E.2d at 747. We are unwilling to hold that it does. After all, there are other controlled

substances that appear as a white or gray rock-like substance. *See, e.g.*, *Nabors*, 365 N.C. at 308, 718 S.E.2d at 624; *State v. Hicks*, 243 N.C. App. 628, 630, 777 S.E.2d 341, 343 (2015); *State v. Mobley*, 206 N.C. App. 285, 292, 696 S.E.2d 862, 867 (2010); *State v. McNeil*, 165 N.C. App. 777, 779, 600 S.E.2d 31, 33 (2004), *aff'd*, 359 N.C. 800, 617 S.E.2d 271 (2005). And the drug paraphernalia seized from the hotel room can be used in connection with other controlled substances. *See, e.g.*, *State v. Wiggins*, 185 N.C. App. 376, 380, 648 S.E.2d 865, 869 (2007); *State v. Muncy*, 79 N.C. App. 356, 358, 339 S.E.2d 466, 468 (1986).

Simply put, if we held that the State's evidence in this case was sufficient to show the seized substance was heroin "beyond a reasonable doubt," it likely would eliminate the need for scientifically valid chemical analysis in many—perhaps most—drug cases. This, in turn, would render our Supreme Court's holding in *Ward* largely irrelevant. This Court has no authority to undermine a Supreme Court holding in that way. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). If the *Bridges* line of cases warrants further expansion—and further eroding of *Ward*—that change in the law must come from the Supreme Court.

Applying *Ward* here, the State's evidence did not establish beyond a reasonable doubt that the seized substance was heroin. 364 N.C. at 147, 694 S.E.2d at 747. Thus, the State was required to present scientifically valid chemical analysis identifying the seized substance as heroin. *Id.* The State concedes it did not do so. Accordingly, the trial court should have granted Osborne's motion to dismiss for insufficient evidence.

[2] Because we rule in Osborne's favor on this issue, we need not address her remaining arguments concerning her conviction on the drug possession charge. Osborne also challenges her convictions for misdemeanor child abuse on the ground that "the indictments for misdemeanor child abuse allege that Ms. Osborne used 'heroin in the presence of the child.' " Osborne argues that the State was required to prove the seized substance was heroin to support these charges as well. We disagree. Unlike the drug possession charge, the misdemeanor child abuse charges did not require the State to present a chemical analysis proving the seized substance was heroin. The State's evidence, including the officers' discovery of Osborne unconscious from an apparent drug overdose; Osborne's admission that she used heroin; and the presence of drug paraphernalia consistent with heroin use in the hotel room occupied by Osborne and her children was sufficient to send these charges to the jury. Likewise, in light of the State's other evidence, the admission of the in-court field test of the seized substance—even if erroneous—was harmless and certainly did not rise to the level of plain error. *State*

v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). We therefore find no error in the trial court's judgment on the misdemeanor child abuse charges.

Conclusion

For the reasons discussed above, we vacate the trial court's judgment on the possession of heroin charge and find no error in the trial court's judgment on the misdemeanor child abuse charges.

VACATED IN PART; NO ERROR IN PART.

Chief Judge McGEE and Judge CALABRIA concur.

STATE OF NORTH CAROLINA
v.
ANTHONY MARCELLIOUS TILGHMAN, DEFENDANT

No. COA17-1308

Filed 2 October 2018

1. Criminal Law—post-conviction DNA testing—materiality—sufficiency of showing

Defendant's request for post-conviction DNA testing did not entitle him to the appointment of counsel under N.C.G.S. § 15A-269(c) where he failed to carry his burden of proving DNA testing would be material to his claim of wrongful conviction by providing no more than conclusory statements that new technology would be more accurate and probative of the identity of the perpetrator.

2. Criminal Law—post-conviction inventory of evidence—adequacy of request

The trial court did not err in denying defendant's post-conviction motion for DNA testing prior to obtaining an inventory of biological evidence where defendant's accompanying motion to locate and preserve evidence did not include an actual request for an inventory as required by N.C.G.S. § 15A-268, and thus was not presented to the trial court for a ruling. While defendant's motion for DNA testing was itself sufficient to trigger an inventory of evidence pursuant to N.C.G.S. § 15A-269, there was no indication the custodial agency was served with that motion. Even if it was the trial court's burden to ensure service upon the agency, the court's denial of the motion

for DNA testing was not in error where defendant failed to sufficiently allege materiality.

Appeal by Defendant from order entered 2 June 2017 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Rana M. Badwan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt B. Orsbon, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Anthony Marcellious Tilghman ("Defendant") appeals from an order denying his *pro se* motion for postconviction DNA testing and to locate and preserve evidence. Defendant contends the trial court erred by: (1) denying his motion for DNA testing prior to ordering and receiving an inventory of all physical and biological evidence; and (2) denying his motion because he sufficiently established his entitlement to appointment of counsel. We dismiss in part and affirm in part.

I. Factual and Procedural History

On 8 September 2014, in accordance with a plea agreement, Defendant pled guilty to five counts of robbery with a dangerous weapon and four counts of second degree kidnapping. The trial court consolidated the charges and sentenced Defendant to two consecutive terms of 72 to 99 months imprisonment. Defendant did not appeal from his guilty pleas.

Three years later, on 13 March 2017, Defendant filed a motion for appropriate relief ("MAR"). On 14 March 2017, Defendant filed a *pro se* "Motion to Locate and Preserve Evidence" and "Motion for Post-Conviction DNA Testing" in Cabarrus County Superior Court. Defendant listed eighteen pieces of physical and biological evidence he desired to be tested and requested the court appoint him legal counsel to assist him in prosecuting the motions.

On 2 June 2017, the trial court entered an order denying both of Defendant's motions.[1] The court found "Judge Kevin M. Bridges entered

1. The trial court labeled Defendant's motions as one motion; however, the order addresses both of Defendant's motions.

an order disposing of the evidence." The court also found "Defendant's Motion is frivolous and no hearing is necessary. The Defendant's Motion fails to set forth any credible basis in law or fact to support his requests." Defendant timely filed written notice of appeal on 14 June 2017. After settlement of the record and the filing of briefs, Defendant filed a petition for writ of *certiorari* on 19 March 2018.

II. Jurisdiction

N.C. Gen Stat. § 15A-270.1 allows a defendant to "appeal an order denying the defendant's motion for DNA testing . . . ." N.C. Gen. Stat. § 15A-270.1 (2017). *See also State v. Doisey*, 240 N.C. App. 441, 445-46, 770 S.E.2d 177, 180 (2015). Our case law allows a defendant to appeal a denial of the appointment of counsel supplemental to this DNA motion. *See State v. Gardner*, 227 N.C. App. 364, 366, 742 S.E.2d 352, 354 (2013). Thus, this Court has jurisdiction over Defendant's arguments regarding his written request for DNA testing and appointment of counsel. As for Defendant's appellate arguments regarding alleged failures to inventory evidence, we, in our discretion, grant Defendant's petition for writ of *certiorari* should his notice of appeal be imperfect. N.C. R. App. P. 21 (2017).

III. Standard of Review

Our standard of review of a trial court's denial of a motion for post-conviction DNA testing is "analogous to the standard of review for a motion for appropriate relief." *Gardner*, 227 N.C. App. at 365, 742 S.E.2d at 354 (citation omitted). Findings of fact are binding on appeal if they are supported by competent evidence, and we review conclusions of law *de novo*. *State v. Turner*, 239 N.C. App. 450, 452, 768 S.E.2d 356, 358 (2015) (citation omitted). We also review whether the trial court complied with a statutory mandate, which is a question of law, *de novo*. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (citation omitted).

IV. Analysis

Defendant's appellate argument is two-fold: (1) the trial court erred by denying his motion for DNA testing because he was entitled to appointment of counsel; and (2) the trial court erred by denying his motion to DNA testing prior to obtaining an inventory of evidence.

A. Entitlement to Appointment of Counsel

[1] Defendant argues the court erred in denying his motion because N.C. Gen. Stat. § 15A-269 entitles him to appointment of counsel.

N.C. Gen. Stat. § 15A-269 states:

> the court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner in accordance with the rules adopted by the Office of Indigent Defense Services *upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.*

N.C. Gen. Stat. § 15A-269(c) (2017) (emphasis added).

Our case law places the burden of proof to show materiality on the moving party. To meet this burden, a moving defendant must allege "more than the conclusory statement that the ability to conduct the requested DNA testing is material to the defendant's defense." *Gardner*, 227 N.C. App. at 369, 742 S.E.2d at 356 (quotation marks and alterations omitted) (citing *State v. Foster* 222 N.C. App. 199, 205, 729 S.E.2d 116, 120 (2012)). Merely asserting conclusory statements that DNA testing could be material to the defense and, if tested, would exonerate defendant are insufficient meet this burden. *See Turner*, 239 N.C. App. at 455-56, 768 S.E.2d at 359 (holding defendant's assertion "[t]he ability to conduct the requested DNA testing is material to [his] defense" was conclusory and, therefore, insufficient to establish materiality under the statute); *Gardner*, 227 N.C. App. at 369-70, 742 S.E.2d at 356 (holding a defendant who pled guilty to fifteen counts of statutory rape failed to meet his burden of materiality when he used a standardized form which provided no space to include an explanation of materiality for DNA testing).

In this case, Defendant entered a guilty plea and did not present any defense to the trial court. Recently, our Court acknowledged a guilty plea increases a defendant's burden to show materiality. *See State v. Randall*, ___ N.C. App. ___, ___, 817 S.E.2d 219, ___, slip op. at *4 (N.C. Ct. App. June 5, 2018) (acknowledging "the inherent difficulty in establishing the materiality required by N.C. Gen. Stat. § 15A-269 for a defendant who pleaded guilty[.]"). However, the Court stated it did "not believe that the statute was intended to completely forestall the filing of such a motion where a defendant did, in fact, enter a plea of guilty." *Id.* at ___, 817 S.E.2d at ___, slip op. at *4. "The trial court is obligated to consider the facts surrounding a defendant's decision to plead guilty in addition to other evidence, in the context of the entire record of the case, in order to determine whether the evidence is 'material.' " *Id.* at ___, 817 S.E.2d at ___, slip op. at *4-*5 (citation omitted).

Defendant's statements of materiality are indistinguishable from *Gardner* and *Turner*. Defendant asserted in his motion for DNA testing the "evidences need to be tested and preserved for the purpose of DNA testing where the results would prove that the Defendant was NOT the perpetrator of the crimes allegedly committed[.]" Defendant further argued he was intoxicated and under the influence of drugs, he never participated in the crime, and he was coerced to take the plea deal and "the DNA results would prove it." Additionally, Defendant maintains the items listed "[w]ere not subject to DNA testing, and today's technology would allow the testing of DNA provide results that are significantly more accurate and probati[ve] of the identity of the perpetrator in which, will exonerate Defend[a]nt."

Defendant asserts these statements taken together meet his evidentiary burden and are not merely conclusory statements. We conclude otherwise and hold the aggregation of Defendant's conclusory statements communicates the same conclusory effect. *See State v. Collins*, 234 N.C. App. 398, 411-12, 761 S.E.2d 914, 922-23 (2014) (holding defendant's statements, in both his *pro se* motion and amended affidavit, concerning "DNA [e]xperts," a "new technique known as 'Touch DNA[,]' " and the ability to subject items to "newer and more accurate testing which would provide results that are significantly more accurate and probative" were each conclusory on their own merit, and, thus, defendant failed to meet the materiality burden under the statute).

Defendant's assertions are incomplete. He provided no information suggesting how new testing is different and more accurate. "Without more specific detail from Defendant, or some other evidence, the trial court [cannot] adequately determine whether additional testing would be significantly more accurate and probative[.]" *Id.* at 412, 761 S.E.2d at 923. Accordingly, and in light of Defendant's guilty plea, we hold Defendant failed to meet his burden of showing materiality under N.C. Gen. Stat. § 15A-269(c).[2] We affirm this portion of the trial court's order denying Defendant's motion.

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2. The trial court's order is devoid of an explicit mention of materiality. Defendant did not bring forth any appellate argument regarding the lack of specific findings or conclusions of law addressing N.C. Gen. Stat. § 15A-269. It is not the role of this Court to make arguments for appellants. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."). Nonetheless, we address this issue, as it may have frustrated our appellate review.

In *Gardner*, our Court did not require specific findings of fact or conclusions of law in the trial court's order denying defendant's motion for postconviction DNA testing. Our Court concluded the trial court's order was sufficient based on the following: (1) the court's statement it reviewed the allegations in defendant's motion; (2) the court citing

B. Denial of Defendant's Motion Prior to an Inventory of Evidence

[2] Defendant argues the trial court erred in "summarily denying his motion" for a complete inventory of all physical and biological evidence relating to his case. Defendant asks this Court to remand the matter to the trial court who would, in turn, reconsider Defendant's motion "in light of that inventory[.]" Defendant requested an inventory of evidence pursuant to N.C. Gen. Stat. § 15A-268 (2017) and N.C. Gen. Stat. § 15A-269, and we address each statute in turn.

1. Inventory of Evidence Pursuant to N.C. Gen. Stat. § 15A-268

N.C. Gen. Stat. § 15A-268 states:

> (a1) Notwithstanding any other provision of law and subject to subsection (b) of this section, a custodial agency shall preserve any physical evidence, regardless of the date of collection, that is reasonably likely to contain any biological evidence collected in the course of a criminal investigation or prosecution.

N.C. Gen. Stat. § 15A-269(b); (3) other findings; and (4) the court's conclusion defendant failed to show the existence of any grounds for relief. 227 N.C. App. at 370, 742 S.E.2d at 356-57. In an unpublished decision, our Court extended the rule in *Gardner*. *State v. Cade*, No. COA14-785, 2015 WL 661171, at *2 (unpublished) (N.C. Ct. App. Feb. 17, 2015) (citation omitted). There, the order did not cite to N.C. Gen. Stat. § 15A-269. 2015 WL 661171, at *2. However, the order included a statement the trial court reviewed the motion, files, and applicable law. 2015 WL 661171, at *2. The trial court concluded there was no basis in law or fact for the motions, Defendant did not establish a viable claim, and there was no merit to the motion. 2015 WL 661171, at *2. Our Court held the trial court did not err by failing to include more specific findings of fact or conclusions of law. 2015 WL 661171, at *2. Moreover, in *State v. Cox*, our Court reviewed a trial court's oral denial of defendant's motion for preservation and inventory of evidence and postconviction DNA testing. 245 N.C. App. 307, 781 S.E.2d 865 (2016). Here, the trial court stated it "carefully" reviewed Defendant's motion, the clerk's file, and applicable law. Additionally, the court found, as stated *supra*, "Defendant's Motion is frivolous[.]" Accordingly, even without a specific finding or conclusion of materiality, though it would be helpful to our appellate review, the lack thereof did not frustrate review.

Our appellate review, without remand, does not run afoul of our Court's recent decision, *State v. Shaw*, ___ N.C. App. ___, 816 S.E.2d 248 (N.C. Ct. App. May 15, 2018). In *Shaw*, the trial court reviewed defendant's motion for postconviction DNA testing as a motion for appropriate relief. *Id.* at ___, 816 S.E.2d at ___, slip op. at *2-*3. Because defendant failed to meet the requirements for a motion for appropriate relief, the court denied his motion. *Id.* at ___, 816 S.E.2d at ___, slip op. at *3. Because the court denied on grounds for motions of appropriate relief and did not address section 15A-269, our Court could not "determine whether defendant's motion for post-conviction DNA testing was properly denied." *Id.* at ___, 816 S.E.2d at ___, slip op. at *6. Consequently, we vacated the order and remanded for review "consistent with the provisions of N.C. Gen. Stat. § 15A-269." *Id.* at ___, 816 S.E.2d at ___, slip op. at *5-*6.

> . . .
>
> (a7) Upon *written request by the defendant*, the custodial agency *shall* prepare an inventory of biological evidence relevant to the defendant's case that is in the custodial agency's custody. If the evidence was destroyed through court order or other written directive, the custodial agency shall provide the defendant with a copy of the court order or written directive.

N.C. Gen. Stat. § 15A-268(a1), (a7) (2017) (emphases added).

Under the plain language of the statute, custodial agencies are obligated to make an inventory of the biological evidence[3] when a defendant makes a "written request." N.C. Gen. Stat. § 15A-268(a7). However, a request for location and preservation of evidence is not a request for an inventory of evidence. *Doisey*, 240 N.C. App. at 447-48, 770 S.E.2d at 181-82. Where a defendant does "not make any written request for an inventory . . . it follows that the trial court did not consider or rule on such a request." *Id.* at 448, 770 S.E.2d at 182. Accordingly, there is no ruling for this Court to review. *Id.* at 448, 770 S.E.2d at 182.

Here, Defendant's motion was not for an *inventory* of evidence. He titled his motion as a "Motion to Locate and Preserve Evidence[.]" (All capitalized in original). He requested an order "to Locate and Preserve any and all physical and biological evidence" and for DNA testing of the evidence. Thus, the trial court did not err in denying Defendant's motion for postconviction DNA testing prior to obtaining an inventory of biological evidence which Defendant never requested, and we must dismiss this argument. *See id.* at 447-48, 770 S.E.2d at 181-82.

Assuming *arguendo* Defendant properly requested an inventory of biological evidence, case law would bind us to dismiss this argument.[4] Our Court recently addressed this issue in *State v. Randall*. In *Randall*, defendant requested "that the trial court require 'custodial law enforcement agency/agencies to inventory the biological evidence relating to his case.' " *Id.* at ___, 817 S.E.2d at ___, slip op. at *8 (emphasis and

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3. N.C. Gen. Stat. § 15A-268 defines "biological evidence" as, *inter alia*, "any item that contains blood, semen, hair, saliva, skin tissue, fingerprints, or other identifiable human biological material . . . ." N.C. Gen. Stat. § 15A-268(a) (2017).

4. In his motion, Defendant notes N.C. Gen. Stat. § 15A-268(a7) requires law enforcement to prepare an inventory of biological evidence. In his brief, Defendant asserts he was "independently entitled to an inventory of all biological evidence under § 15A-268(a7) because he specifically cited this provision in his motion requesting an inventory."

alterations omitted). Although defendant asserted he requested an inventory from agencies, the record did not contain "evidence of these requests[.]" *Id.* at ___, 817 S.E.2d at ___, slip op. at *8-*9. Our Court held "[w]ithout evidence that [d]efendant made proper requests . . . and without any indication that the trial court considered the issue below" there was no ruling for this Court to review. *Id.* at ___, 817 S.E.2d at ___, slip op. at *9 (citation omitted). Accordingly, we dismissed defendant's argument. Here, similar to defendant in *Randall*, the record is devoid of evidence Defendant made proper requests, and we would still dismiss this issue.

2. Inventory of Evidence Pursuant to N.C. Gen. Stat. § 15A-269

N.C. Gen. Stat. § 15A-269 states:

> (f) Upon receipt of a motion for postconviction DNA testing, the custodial agency shall inventory the evidence pertaining to that case and provide the inventory list, as well as any documents, notes, logs, or reports relating to the items of physical evidence, to the prosecution, the petitioner, and the court.

N.C. Gen. Stat. § 15A-269(f). Unlike N.C. Gen. Stat. § 15A-268, a defendant need not make a request for an inventory of physical evidence. *Doisey*, 240 N.C. App. at 445, 770 S.E.2d at 180 (citation omitted). Instead, the custodial agency's obligation to inventory evidence is triggered "[u]pon receipt of a motion for postconviction DNA testing[.]" N.C. Gen. Stat. § 15A-269(f). *See Doisey*, 240 N.C. App. at 445, 770 S.E.2d at 180. The statute is silent as to whether a defendant or the trial court bears the burden of serving the motion for inventory on the custodial agency.

Here, the record lacks proof either Defendant or the trial court served the custodial agency with the motion for inventory. Assuming *arguendo* it is the trial court's burden to serve the custodial agency with the motion, any error by the court below is harmless error. As held *supra*, Defendant failed to meet his burden of showing materiality. Accordingly, the trial did not err by denying his motion for DNA testing prior to an inventory under N.C. Gen. Stat. § 15A-269(f).

V. Conclusion

For the foregoing reasons, we dismiss part of Defendant's appeal and affirm the trial court's order.

DISMISSED IN PART; AFFIRMED IN PART.

Judges ELMORE and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JUHAROLD ZAEDWARD VANN

No. COA17-1158

Filed 2 October 2018

1. Appeal and Error—preservation of issues—motion in limine—argument not raised at trial

Defendant did not preserve for appeal the question of whether the trial court erred by failing to require the State to file a written pretrial motion to suppress where he did not raise the issue at trial.

2. Evidence—expert witness testimony—eyewitness identification

The trial court did not abuse its discretion by partially sustaining the State's objection to expert witness testimony on memory perception and eyewitness identification. The expert witness testified in a voir dire hearing that four factors were present that could affect the eyewitness identifications in this case, but the trial court ruled that two of them were such elementary, commonsense concepts and that expert testimony on those factors would be of no help to the jury.

3. Evidence—telephone conversation—Rule of Completeness

The trial court did not abuse its discretion in a prosecution for shooting a convenience store clerk by sustaining the State's objection to portions of defendant's jailhouse telephone call with his grandmother. Portions of the telephone call showing defendant's knowledge of the crime were admitted and defendant argued that other portions of the conversation should have been admitted under the Rule of Completeness. The trial court noted that admitting the additional evidence could open the door to admission of other clearly inadmissible parts of the conversation.

4. Appeal and Error—preservation of issues—Confrontation Clause—telephone conversation

Defendant waived a Confrontation Clause objection involving the authentication of a jailhouse telephone conversation where the objection was not renewed during cross-examination when defendant attempted to ask about a statement that had been ruled inadmissible.

Appeal by defendant from judgment entered 24 February 2017 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 September 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General David D. Lennon, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

TYSON, Judge.

Juharold Zaedward Vann ("Defendant") appeals from judgment entered, following his jury's conviction of assault with a deadly weapon with intent to kill inflicting serious injury. We find no error.

I. Factual Background

The State's evidence tended to show on 11 August 2014, Mahmoud Albdoor ("Albdoor") was working at his convenience store, "Southside Mart," with his nephew, Jamil Swedat ("Swedat"). Shortly after 1:00 p.m., Defendant entered the Southside Mart and attempted to buy a cigar wrapper from Swedat, who stood at the cash register. Defendant did not have enough money to purchase the product, and Swedat refused to sell him the wrapper. Defendant became upset and began arguing with Swedat. After a brief argument with Swedat, Defendant knocked over a Slim Jim dehydrated jerky stick display on the counter, ran out of the store, and turned right upon exiting.

Albdoor testified he was also standing behind the counter, approximately five to six feet away from Defendant, and observed his entire altercation with Swedat. Albdoor identified Defendant as the person who had argued with Swedat on 11 August 2014. Defendant admitted to police officers he had engaged in a verbal altercation with Swedat and had knocked over a Slim Jim counter display at the Southside Mart.

Approximately one hour later, a man entered the Southside Mart with an orange shirt covering his face and fired four to five shots from a black handgun at Swedat, with one bullet striking him in the right side. Albdoor testified after the shooting stopped, he looked up from behind the counter and observed the side of the shooter's face as he fled from the store. Albdoor testified the shooter ran towards the right upon exiting the Southside Mart, just as Defendant had done earlier that day. Albdoor also identified Defendant as the shooter.

Swedat gave a written statement to Charlotte-Mecklenburg Police Officer Quentin Blakeney on 11 August 2014 and identified Defendant as the individual who had shot him earlier that day. A redacted version of this statement was read to the jury. Because Defendant had gained

weight, wore glasses, and "dressed nice" at trial, Swedat initially did not recognize Defendant in court. Swedat identified Defendant as the shooter on the second day of his testimony.

Charlotte-Mecklenburg Police Officer Timothy Kiefer testified on 17 August 2014, he responded to a call for service at 3463 Markland Drive in Charlotte, which was located approximately two hundred yards from the Southside Mart. Upon arrival, Officer Kiefer spoke with a resident of that address who had found a 9 millimeter handgun wrapped in a black and white striped Polo shirt and an orange T-shirt behind his trash cans. At trial, Kelly Shea, a DNA analyst with the Charlotte-Mecklenburg crime laboratory, testified that she was unable to obtain any useable DNA from either the pistol or the shirts.

Todd Nordhoff, a Charlotte-Mecklenburg crime laboratory firearm and toolmark examiner, was admitted as an expert in firearms and toolmark identification. Nordhoff testified the pistol recovered by Officer Kiefer was a Star semi-automatic pistol chambered for 9 millimeter Luger ammunition. Nordhoff further testified the four discharged shell cases recovered at the scene had been fired by that pistol.

Defendant testified at trial and admitted to arguing with Swedat and knocking over the Slim Jim counter display at the Southside Mart. Defendant denied being the gunman and testified that after the verbal altercation he went to his grandfather's house at 2921 Markland Drive, which was located approximately ten minutes away from the Southside Mart. Defendant testified he asked his grandfather for a ride to Lexington, North Carolina, where Defendant had a job the next day. Fifteen minutes after arriving at his grandfather's house, his grandfather took Defendant to a Wendy's restaurant located approximately ten minutes away and then drove Defendant to Lexington.

The State sought to introduce, over Defendant's objections, portions of a telephone conversation purportedly between Defendant and his grandmother recorded from the Mecklenburg County Jail on 1 September 2014. The trial court conferred with counsel and announced that it would sustain Defendant's objections to certain portions of the telephone conversation.

A portion of the conversation allowed into evidence by the trial court included Defendant's grandmother questioning him over whether the police had really found the gun or were merely just saying they had. Defendant argued to her the police officers must have the gun, because the gun had been found with the orange shirt and Polo shirt. Defendant added there was no way the police would have known the shirts were with the gun, unless the police had actually found them.

Three days after the shooting, Defendant was arrested for assault with a deadly weapon with intent to kill inflicting serious injury and was subsequently indicted on the same charge on 2 September 2014. Defendant entered a plea of not guilty. On 24 February 2017, the jury returned a verdict of guilty of one count of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was sentenced in the presumptive range to a minimum of 70 months and a maximum of 96 months imprisonment, with 512 days of credit for presentence confinement.

Defendant gave notice of appeal in open court.

II. Jurisdiction

Jurisdiction of right lies in this Court by timely appeal from final judgment entered by the superior court, following a jury's verdict pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017) and N.C. Gen. Stat. § 15A-1444(a) (2017).

III. Issues

Defendant asserts the trial court erred by (1) not requiring the State to file a suppression motion regarding Dr. Lori R. Van Wallendael's ("Dr. Van Wallendael") testimony; (2) partially sustaining the State's objection to Dr. Van Wallendael's testimony regarding the factors affecting the reliability of eyewitness identification; and, (3) excluding portions of Defendant's 1 September 2014 telephone conversation.

IV. Suppression Motion

[1] Defendant argues the trial court erred by failing to require the State to "file a written pre-trial motion to suppress or motion *in limine*, pursuant to [N.C. Gen. Stat. § 15-977.]" Defendant did not raise this argument at trial and has failed to preserve this argument for review on appeal.

> Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts. . . . The defendant may not change his position from that taken at trial to obtain a steadier mount on appeal.

State v. Holliman, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (quotations omitted); *see State v. Monk*, 132 N.C. App. 248, 254, 511 S.E.2d 332, 336, *disc. review denied*, 350 N.C. 845, 539 S.E.2d 1 (1999) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating

the *specific grounds* for the ruling the party desired the court to make if the specific grounds were not apparent from the context." (citation omitted)). Defendant failed to raise this argument at trial and cannot assert this argument for the first time on appeal. This assignment of error is dismissed.

V. Exclusion of Expert Witness Testimony

[2] Defendant argues the trial court erred by partially sustaining the State's objection to expert testimony by a UNC-Charlotte professor, Dr. Lori Van Wallendael, regarding the factors affecting the reliability of eyewitness identification.

A. Standard of Review

"This court has held that the admission of expert testimony regarding memory factors is within the trial court's discretion, and the appellate court will not intervene where the trial court properly appraises probative and prejudicial value of the evidence under Rule 403 of the Rules of Evidence." *State v. Cotton*, 99 N.C. App. 615, 621, 394 S.E.2d 456, 459 (1990) (citing *State v. Knox*, 78 N.C. App. 493, 495-96, 337 S.E.2d 154, 156 (1985)). The Court in *Knox* stated the following standard for determining the admissibility of such testimony:

> Expert testimony is properly admissible when it "can assist the jury to draw certain inferences from facts because the expert is better qualified." The test for admissibility is whether the jury can receive "appreciable help" from the expert witness. Applying this test requires balancing the probative value of the testimony against its potential for prejudice, confusion, or undue delay. *See* N.C. Gen. Stat. 8C-1, Rule 403. Even relevant evidence may be excluded if its probative value is outweighed by the danger that it will confuse or mislead the jury. The court "is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony."

Knox, 78 N.C. App. at 495, 337 S.E.2d at 156 (citations omitted).

This Court has also noted, "expert testimony on the credibility of a witness is inadmissible[.]" *State v. Davis*, 106 N.C. App. 596, 602, 418 S.E.2d 263, 267 (1992) (citations omitted). Our Supreme Court has held: "When the jury is in as good a position as the expert to determine an issue, the expert's testimony is properly excludable because it is not helpful to the jury." *Braswell v. Braswell*, 330 N.C. 363, 377, 410 S.E.2d 897, 905 (1991) (citation omitted).

B. Analysis

Dr. Lori Van Wallendael was qualified and accepted by the court as an expert witness in the field of memory perception and eyewitness identification. Defendant sought to have Dr. Van Wallendael testify on his behalf concerning whether any factors were present that could have affected Albdoor's and Swedat's identifications of Defendant as the shooter. The State objected.

The trial court conducted a *voir dire* hearing to determine whether to admit or exclude Dr. Van Wallendael's testimony. Dr. Van Wallendael identified four factors in the present case which could have affected Albdoor's and Swedat's identifications of Defendant: (1) the time factor, (2) the disguise factor, (3) the stress factor, and (4) the weapon focus effect. *See generally* Hon. D. Duff McKee, *Challenge to Eyewitness Identification Through Expert Testimony*, 35 Am. Jur. Proof of Facts 3d 1, § 10 (1996 & Supp. 2018) (describing psychological factors affecting eyewitness identification).

Dr. Van Wallendael related that the time factor means the likelihood of an accurate identification increases the longer in time a witness has to view the perpetrator's face. For the second factor, a disguise refers to anything covering the face of the perpetrator, which decreases the chances of an accurate identification later by the eyewitness. The stress factor states that stress, especially from violent crimes, can significantly reduce an eyewitness's ability to remember accurately. Dr. Van Wallendael testified that studies on the weapon focus factor have shown people confronted with a weapon tend to concentrate their attention on the weapon itself, and not the individual holding the weapon, which decreases the likelihood of an accurate identification of the assailant or shooter later. Psychologists refer to this phenomenon as the weapon focus effect. *See id.*

After hearing arguments from both sides, the trial court sustained the State's objection to Dr. Van Wallendael's opinion testimony concerning the time and disguise factors. The trial court noted these two concepts "are such elementary, common sense conclusions that it would be of little if any benefit to the jury to hear someone purporting to be an expert to espouse those opinions."

The trial court, however, did allow Dr. Van Wallendael to testify on the stress factor and weapon focus effect, noting expert testimony on these two concepts "could be helpful to the jury." In addition, the trial court strongly admonished the defense and Dr. Van Wallendael not to express any opinion regarding the credibility or reliability of a witness.

Defendant has failed to show any abuse of discretion by the trial court in partially sustaining the State's objection. The trial court properly found the time and disguise concepts were "common sense conclusions that . . . would be of little if any benefit to the jury" and excluded expert testimony on these two factors. *See Smith v. Pass*, 95 N.C. App. 243, 251, 382 S.E.2d 781, 786 (1989) ("Rule 702 permits a witness qualified as an expert to offer opinion testimony about his or her area of expertise *if the trier of fact determines such testimony would be helpful to the jury*." (emphasis supplied)).

The trial court correctly found expert testimony on these two factors would be of little help to the jury and strongly admonished Dr. Van Wallendael not to express any opinion concerning the credibility or reliability of a witness, to prevent her testimony from invading the province of the jury. *See State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988) ("The credibility of the witnesses and the weight to be given their testimony is exclusively a matter for the jury." (citation omitted)).

After the State objected, the trial court excused the jury, conducted a *voir dire* examination of Dr. Van Wallendael to determine the substance of her testimony, and heard and considered arguments of counsel before partially sustaining the State's objection. The trial court did allow Dr. Van Wallendael to testify to both the stress factor and weapon focus effect, noting these two concepts "could be helpful to the jury." Defendant has not shown the trial court abused its discretion in partially sustaining the State's objection to Dr. Van Wallendael's testimony.

Although the trial court did not make a specific finding that the probative value of this admitted testimony outweighed its prejudicial effect, the procedure it followed demonstrates the trial court conducted its discretionary balancing test under Rule 403 and its ruling was "the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citation omitted) ("A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision."). We defer to the trial court's exercise of discretion and its "reasoned decision." *Id.* Nothing in the trial court's ruling prevented Defendant from probing the time and disguise factors upon cross-examination of the State's witnesses and to bring forth and argue any asserted flaws and doubts in the victim's identification of Defendant as the perpetrator of the crime due to the length of time of the crime or the impact of any disguise the shooter wore. Defendant's argument is overruled.

VI. Exclusion of Defendant's Telephone Conversation

[3] Defendant argues the trial court erred by allowing the State to offer portions of Defendant's 1 September 2014 telephone call with his grandmother into evidence, but refusing to allow Defendant to offer other portions from the same telephone call into evidence. Defendant asserts the exclusion of portions of the telephone call violated (1) the Rule of Completeness and (2) Defendant's constitutional "right to fully confront and cross-examine the witnesses against him."

A. Rule of Completeness

N.C. Gen. Stat. § 8C-1, Rule 106 (2017) codifies the common law Rule of Completeness and states: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

Our Supreme Court reviewed and addressed Rule 106 in *State v. Thompson* and noted North Carolina's rule is identical to the Federal rule, which has been interpreted and applied in many federal courts' decisions. 332 N.C. 204, 219, 420 S.E.2d 395, 403 (1992).

The Court in *Thompson* set out the following principles as our standard of review:

> The lessons of the federal decisions discussing Rule 106 are well settled. Rule 106 codifies the standard common law rule that when a writing or recorded statement or a part thereof is introduced by any party, an adverse party can obtain admission of the entire statement or anything so closely related that in fairness it too should be admitted. *The trial court decides what is closely related. The standard of review is whether the trial court abused its discretion*. The purpose of the 'completeness' rule codified in Rule 106 is merely to ensure that a misleading impression created by taking matters out of context is corrected on the spot, because of the inadequacy of repair work when delayed to a point later in the trial.
>
> Federal decisions also make [it] clear that Rule 106 does not require introduction of additional portions of the statement or another statement that are neither explanatory of nor relevant to the passages that have been admitted.

Id. at 219-20, 420 S.E.2d at 403-04 (emphasis supplied) (citations and internal quotation marks omitted).

The admitted portions of the telephone conversation between Defendant and his grandmother tend to show Defendant possessed knowledge of the crime that only the shooter would know. Defendant sought to introduce an additional portion of the telephone conversation, in which Defendant's grandmother said "you didn't do it," and Defendant responded, "I know."

The State objected on grounds that the trial court had already ruled only the portion of the telephone conversation previously agreed upon by both parties was admissible, which did not include the above exchange. Defendant argued the door had been opened by the admission of the agreed-upon limited portion of the conversation to admit the proffered statements.

The trial court sustained the State's objection to the introduction of this portion of the conversation and noted if it ruled the agreed-upon portion of the conversation opened the door for any other part, that might be grounds for the State to demand admission of other clearly inadmissible parts of the conversation. Defendant's assertion that the trial court violated the Rule of Completeness and abused its discretion in sustaining the State's objection and excluding other portions of the 1 September 2014 telephone conversation is without merit.

This portion of the conversation admitted before the jury dealt largely with Defendant's explanation to his grandmother of the evidence the State had amassed against him. Defendant must demonstrate the statements concerning whether and how the police had actually found the gun were taken out of context when introduced into evidence. Defendant's exculpatory statement to his grandmother was "neither explanatory of nor relevant to" his admitted statements regarding whether the police found the gun. *See id.* Presuming Defendant's conversation evinces knowledge of the crime, Defendant did not admit to the crime during the conversation and his response, "I know," to his grandmother's statement was not explanatory of or relevant to his other discussion of the State's recovery and possession of the gun.

In excluding this portion of the telephone conversation, the trial court correctly expressed concerns that admission of this not agreed-upon portion of the telephone call could open the door to other portions of the conversation, which both parties had previously agreed were inadmissible. Defendant has failed to show the trial court abused its discretion when it sustained the State's objection to this portion of

the 1 September 2014 telephone conversation. Defendant's arguments are overruled.

B. Confrontation Clause Claim

[4] Defendant contends it was reversible error for the trial court to exclude the aforementioned portion of the 1 September 2014 telephone call because it violated his constitutional right to fully confront and cross-examine the witnesses against him. *See* U.S. Const. amend. VI; N.C. Const. art. I, § 23. Defendant has failed to preserve this issue for appeal.

1. Standard of Review

Our Supreme Court has stated:

> It is well established that a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. It follows that in order for an appellant to assert a constitutional or statutory right on appeal, the right must have been asserted and the issue raised before the trial court. In addition, it must affirmatively appear on the record that the issue was passed upon by the trial court.

State v. McDowell, 301 N.C. 279, 291, 271 S.E.2d 286, 294 (1980) (citations omitted).

2. Analysis

Defendant referenced the Confrontation Clause briefly in his objection to authentication of the 1 September 2014 telephone conversation. The trial court and parties conferred and the trial court partially sustained the Defendant's objection. After the trial court ruled that certain portions of the telephone conversation would be inadmissible, Defendant's counsel stated, "I'm fine with the other portion." Mecklenburg County Sheriff's Office Sergeant Thomas Shields then testified to the authenticity of the recorded phone conversation and the agreed-upon portions were played before the jury.

Later during cross-examination of Sergeant Shields, Defendant attempted to question Sergeant Shields about the statement counsel had previously agreed, and the court had ruled, to be inadmissible. The State objected. The trial court heard arguments from both sides and sustained the State's objection. During this exchange, defense counsel did not specifically assert Defendant's rights under the Confrontation Clause.

Defendant's failure to raise the Confrontation Clause here is a waiver of these rights. *See id.*; *see also Monk*, 132 N.C. App. at 254, 511 S.E.2d at 336 (" 'In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the *specific grounds* for the ruling the party desired the court to make if the specific grounds were not apparent from the context.' " (citation omitted)). This argument is dismissed.

VII. Conclusion

Defendant failed to preserve for review procedural issues regarding the State's objection to Dr. Van Wallendael's testimony. The trial court did not abuse its discretion by partially sustaining the State's objection to Dr. Van Wallendael's testimony regarding the commonsense time and disguise factors presumably affecting the reliability of eyewitness identification. Defendant was free to probe these factors from the State's witnesses and argue to the jury.

The trial court also did not abuse its discretion by excluding portions of Defendant's 1 September 2014 jailhouse telephone conversation with his grandmother, after review, agreement and consent of counsel. Defendant failed to renew or preserve for review constitutional issues on the exclusion of the aforementioned conversation. Defendant received a fair trial, free from prejudicial errors he preserved and argued. *It is so ordered.*

NO ERROR.

Judges INMAN and BERGER concur.

STATE v. WARDRETT

[261 N.C. App. 735 (2018)]

STATE OF NORTH CAROLINA
v.
CALEB E. WARDRETT, DEFENDANT

No. COA17-1418

Filed 2 October 2018

1. Appeal and Error—preservation of issues—juror presence at charge conference—sufficiency of record

Defendant failed to provide sufficient information for appellate review of his argument that a juror who entered the courtroom during the jury charge conference in defendant's trial for possession of a firearm by a felon heard information that deprived defendant of a unanimous jury verdict. The scant facts in the transcript, without a supplemental narrative to provide context, were not enough to overcome the presumption that the court proceedings were correct and regular where they merely showed that the courtroom clerk noticed a juror entering the courtroom, the judge took notice of the juror, and then instructed counsel to proceed with the charge conference.

2. Criminal Law—prosecutor's closing argument—name-calling—propriety

During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor's reference to defendant as one of a number of "fools" who participated in an altercation during which defendant fired a gun did not constitute an improper attack on defendant but was a fair commentary, based on the evidence, regarding reckless behavior.

3. Criminal Law—prosecutor's closing argument—personal belief of evidence—propriety

During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor improperly vouched for the truthfulness of the State's witnesses, but the statements were not grossly improper warranting a new trial, because the prosecutor made the statements to show the witnesses' relationships with defendant and how the witnesses tended to corroborate one another.

4. Criminal Law—prosecutor's closing argument—personal belief of guilt—propriety

During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor improperly stated that defendant was "absolutely guilty," but the statements did not deprive

defendant of a fair trial where they followed the prosecutor's evaluation of the strength of the State's witnesses and did not suggest any perceived personal knowledge of the prosecutor.

5. Criminal Law—prosecutor's closing argument—matters outside the record—propriety

During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor did not improperly summarize a sequence of events involving defendant giving his gun to a friend to hide by saying defendant told his friend "man, get rid of this." Even though the phrase was not a direct quote, it represented a fair inference arising from the testimony.

6. Criminal Law—prosecutor's closing argument—accountability to community—propriety

During closing argument at defendant's trial for possession of a firearm by a felon, the prosecutor's statements that the jurors should take into account the community's concerns and asking them to "handle this unfinished business" were not improper because they did not suggest the jury would be held accountable to the community's demands, but rather involved commonly held beliefs and were an attempt to motivate the jury to reach a just result.

Appeal by Defendant from judgment entered 25 May 2017 by Judge J. Carlton Cole in Nash County Superior Court. Heard in the Court of Appeals 23 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Victoria L. Voight, for the State.

Warren D. Hynson for Defendant.

INMAN, Judge.

Caleb E. Wardrett ("Defendant") appeals his conviction following a jury verdict finding him guilty of possession of a firearm by a felon. After careful review of the record and applicable law, we conclude that Defendant failed to submit an adequate record on appeal to support his challenge to the unanimity of the jury verdict. We also reject Defendant's argument that the prosecutor's comments during closing argument were so grossly improper that the trial court should have intervened absent objection.

Procedural and Factual Background

The evidence presented at trial tended to show the following:

On the night of 27 September 2014, Alberta Jones ("Alberta") hosted a party at her house in Rocky Mount with family, friends, and neighbors attending. Shortly before 1:00 a.m., just outside of Alberta's house, Defendant's cousin, Anthony Austin ("Anthony"), and Ricky Jones ("Ricky") engaged in an argument over whether Ricky had given Anthony fake money. Defendant participated in the quarrel, causing Ricky to retrieve his shotgun from his home, which was nearby, because he knew Defendant likely had a gun. When Ricky returned with his shotgun, Defendant pointed his gun at Ricky and ordered Ricky to drop the shotgun. Defendant then fired his own gun in the air several times. Robert Earl Jones ("Robert"), Ricky's uncle, urged Defendant and Ricky to stop arguing. Alberta then called the police.

Before the police arrived, Defendant gave his gun to a friend, Ronaldo Wesson ("Ronaldo"), who took the gun to a house across the street owned by his uncle, Joseph "JoJo" McClain ("JoJo"), and stowed the gun under the mattress in JoJo's bedroom. Rocky Mount Police Officer William Spikes and Officer Judd (collectively "the Officers") responded to the gunshot call. Defendant left the area before the Officers arrived. No witness was willing to say who had fired a gun. The Officers did not find Defendant's gun or Ricky's shotgun, but they found gun shell casings near the area where Defendant, Anthony, and Ricky had been quarreling.

After the Officers left, Anthony struck Ricky, who then shot and killed Anthony. About five minutes after the Officers left from responding to the first gunshot call, they received another call to Alberta's house, where they returned and found Ricky walking on the road away from the house, shotgun in hand. The Officers arrested Ricky.

Detectives Darius Hudgins and John Denton (collectively "the Detectives") arrived to investigate the homicide. Defendant, who had returned to Alberta's house by the time the Detectives arrived, agreed to go to the police station to give a statement, but he never followed up.

Both Ricky and Robert told the Detectives that it was Defendant who had fired the gun that prompted the first call to police. JoJo guided the Detectives to the gun that was hidden under the mattress at the behest of Defendant, and Ronaldo told the Detectives that Defendant had given him the gun to hide.

The gun the Detectives retrieved from beneath the mattress was a Smith & Wesson 9 millimeter handgun with an extended clip. The shell

casings found by the Officers following the first call were not tested to determine whether they were from that gun, nor were any fingerprints found on the gun. But among the 23 bullets found within the gun—the extended clip could hold a maximum of 30—five had "the same manufacturer, color and caliber of what was found" on the ground by Alberta's house.

A warrant was issued for Defendant's arrest on 27 September 2014. He was eventually located and arrested in Norfolk, Virginia.

At the close of the State's evidence, defense counsel moved to dismiss the charge, and the trial court denied the motion. Defendant did not present evidence. The jury found Defendant guilty of possession of a firearm by a felon. The trial court sentenced Defendant to minimum of 19 months and maximum of 32 months in prison, with credit for time served in pre-trial custody. Defendant timely appealed.

Analysis

I. Unanimous Jury Verdict

[1] Defendant's first argument concerns a juror entering the courtroom during the jury charge conference on the flight instruction. The trial transcripts reflects the following:

> MADAM COURT REPORTER: Judge, –
>
> MR. TUCKER: – details.
>
> MADAM COURT REPORTER: – there's a juror. There's a juror coming in.
>
> THE COURT: Thank you, Madam Court Reporter. I saw her. I [sic] didn't even dawn on me. You may continue.

Defendant contends that, because the juror entered the courtroom during the charge conference and possibly became privy to information outside the presence of the other jurors, Defendant's right to a unanimous jury verdict, pursuant to N.C. Const. Art. I, § 24, was violated. We will not consider this issue because Defendant did not provide a sufficient record to allow meaningful appellate review.

"It is the appellant's responsibility to make sure that the record on appeal is complete and in proper form." *Miller v. Miller*, 92 N.C. App. 351, 353, 374 S.E.2d 467, 468 (1988). When a defendant is faced with an incomplete transcript, he can reconstruct the relevant portions through a written narrative. *See* N.C. R. App. P. 9(c)(1) ("Parties shall use [narrative] form or combination of forms best calculated under

the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum expense to the litigants."); *id.* 9(a)(3)(e) ("The record on appeal in criminal actions shall contain: so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal . . . ."). Here, the transcript is devoid of any information beyond the lone juror's entrance into the courtroom during the charge conference. The record is silent as to whether the juror proceeded past the courtroom door. The trial court's statement "You may continue" suggests that the juror immediately exited the courtroom. After this statement by the trial court, defense counsel continued with her argument, rather than objecting, which also suggests that the juror did not remain in the courtroom. Defendant relies solely on the transcript portion above and has not submitted a supplemental narrative to provide context for the alleged error. Review of this matter would require speculation as to the length of time the juror was in the courtroom and information he or she might have overheard.

There is a "longstanding rule [] that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the appellant to show error." *L. Harvey & Son Co. v. Jarman*, 76 N.C. App. 191, 195-96, 333 S.E.2d 47, 50 (1985). When "the appellant presents evidence to rebut such a presumption, [we] will not turn a deaf ear to that evidence." *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616 (1998). Defendant has not produced any evidence overcoming that presumption. The transcript indicates only that the courtroom clerk noticed that a juror was entering the courtroom during the charge conference, that the trial court took notice, and that the trial court then instructed counsel to proceed with the charge conference. Defendant has failed to show that the juror remained in the courtroom or that the trial court erred with respect to that juror.

The short dialogue during the charge conference is insufficient for us to review this issue. Because Defendant "has made no attempt to reconstruct the evidence," *In re Bradshaw*, 160 N.C. App. 677, 681, 587 S.E.2d 83, 86 (2003), and has not demonstrated that he did not have the means to compile such a narration, *In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003), we dismiss this issue.

II. Prosecutor's Closing Argument

Next, Defendant argues that the trial court should have intervened *ex mero motu* during closing arguments because the prosecutor's statements were grossly improper. Although some of the prosecutor's

statements were improper, we conclude they were not so improper as to deprive Defendant of a fundamentally fair trial.

North Carolina General Statute § 15A-1230(a) provides:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230(a) (2015). The standard of review for alleged improper closing arguments absent timely objection "is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). Our review employs a two-step test: "(1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). The burden is on the appellant to show a "reasonable possibility that, had the error[s] in question not been committed, a different result would have been reached at trial." *Id.* at 185, 804 S.E.2d at 473 (quoting N.C. Gen. Stat. § 15A-1443(a) (2015)). When determining "whether the prosecutor's remarks are grossly improper, the remarks must be viewed in context and in light of the overall factual circumstances to which they refer." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995).

A. Name-Calling

[2] Defendant argues that the trial court should have intervened when the prosecutor referred to Defendant as a "fool." The prosecutor, after reminding jurors that Ricky had been prosecuted and convicted for killing Anthony, argued as follows: "But one of the problems we've got is this, and you all know it, is these fools on the streets with guns. One of the fools was on the street that night. We've got one fool left. I'm asking you, are you going to handle this unfinished business for me?"

Because defense counsel did not object at trial, Defendant cannot obtain relief unless he demonstrates that the prosecutor's words were improper *and* "extreme and calculated to prejudice the jury." *State v. Thompson*, 188 N.C. App. 102, 110, 654 S.E.2d 814, 820 (2008). Considering the context of the argument, we conclude that the prosecutor's use of the term "fool" was not improper.

In *State v. Nance*, 157 N.C. App. 434, 442-43, 579 S.E.2d 456, 461-62 (2003), we held that it was improper for the prosecutor to call the defendant a "liar." In *State v. Hamlet*, 312 N.C. 162, 173, 321 S.E.2d 837, 845 (1984), our Supreme Court held that it was improper for the prosecutor to call the defendant an "animal" and his neighborhood a "jungle." In each case, the defendant failed to prove that the prosecutors' statements were prejudicial. *Nance*, 157 N.C. App. at 442-43, 579 S.E.2d at 462; *Hamlet*, 312 N.C. at 173, 321 S.E.2d at 845.

In *State v. Jones*, 355 N.C. 117, 133-34, 558 S.E.2d 97, 107-08 (2002), our Supreme Court reversed the defendant's conviction and death sentence and ordered a new trial because a prosecutor repeatedly called the defendant a "quitter," "loser," and "lower than the dirt on a snake's belly." The argument was so grossly improper, the Supreme Court held, that the trial court deprived the defendant of a fair trial by not intervening, even in the absence of an objection by defense counsel. *Id.* at 134, 558 S.E.2d at 108. The Court reasoned that the argument "improperly [led] the jury to base its decision not on the evidence relating to the issues submitted, but on misleading characterizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal." *Id.* at 134, 558 S.E.2d at 108.

Here, unlike in *Jones*, the prosecutor's remarks related to the gun fight that had occurred and did not single out Defendant as a "fool," but compared him to other "fools" who behave recklessly with firearms. The prosecutor did not make repeated ad hominem attacks on Defendant like the prosecutor in *Jones*.

Reviewing the closing argument as a whole, the prosecutor's reference to Defendant as a "fool" was not "calculated to lead the jury astray," but was simply a fair commentary based upon the evidence. *Id.* at 133, 558 S.E.2d at 108. It was not improper for the prosecutor to declare Defendant a "fool" based on evidence that he intervened in an argument between two other people, pointed a loaded firearm at Ricky, discharged the firearm, and enlisted help to hide the firearm, all while being a convicted felon. In contrast to the terms used in *Nance*, *Hamlet*, and *Jones*, while calling someone a "fool" is not a compliment, it was not abusive or otherwise improper in the context of the evidence presented in this case. Though one might disagree with the prosecutor's phrasing, it does not render his argument improper.

B. Personal Belief of the Evidence

[3] Defendant next argues that the trial court should have intervened because the prosecutor expressed his belief as to the veracity of the

witnesses. Defendant points to the following italicized portions of the State's closing argument:

> First off, he tried to suggest to you that these people that the State presented to you are not telling the truth. Ask yourself what reason there might be for that. You watched them all testify. This person is like family to them, this Defendant. *What reason would they have to falsely come in here, falsely come in here, and say that he committed this offense.* Was any of that suggested to you while they were being cross-examined? I didn't hear it.
>
> . . . .
>
> *The other reason that I'm telling you that these witnesses are telling the truth about* it is think about the one thing that Ricky Jones and Robert Earl Jones mentioned about the gun. The two of them said one distinguishing characteristic about is that it had a long clip in it. Remember them saying that? Well, when this clip is in this gun you can see right here it will extend from that gun while it's loaded. It will be obvious even while you're holding it like you're going to fire it that it has a long clip in it. . . . Now, at the time Ricky Jones said that and Robert Earl Jones said that to – to law enforcement about it, they couldn't possibly have known that that very gun was going to [be] pulled out of JoJo's house. So, how did they know that gun had a long clip in it unless they really saw the Defendant with it? *They're telling the truth about it, because they saw it happen and because the Defendant frankly did it. Period, the end.*

(emphasis added). Looking at the statements in context and through the totality of the circumstances, the prosecutor's statements, while improper, were not grossly improper and do not merit reversal of Defendant's conviction.

Prosecutors cannot personally vouch for their witnesses, but can "argue that the State's witnesses are credible." *State v. Augustine*, 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005). The current factual background is akin to facts reviewed by our Supreme Court in *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002) and *State v. Wilkerso*n, 363 N.C. 382, 683 S.E.2d 174 (2009). In *Wiley*, the defendant argued that, because the prosecutor's case leaned heavily on witness testimony, his comments regarding the witnesses' truthfulness were grossly improper. *Wiley*, 355 N.C.

at 622, 565 S.E.2d at 43. The Supreme Court held the comments were not improper because, rather than expressing his personal opinion, the prosecutor was merely "giving the jury reasons to believe the state's witnesses who had given prior inconsistent statements and were previously unwilling to cooperate with investigators." *Id.* at 622, 565 S.E.2d at 43.

In *Wilkerson*, the prosecutor impermissibly told the jury that a witness was telling the truth. *Wilkerson*, 363 N.C. at 425-26, 683 S.E.2d at 200. The Supreme Court held that the comment violated N.C. Gen. Stat. § 5A-1230(a), but that it was not grossly improper. *Id.* at 425, 683 S.E.2d at 200.

In this case, the prosecutor was attempting to bolster the credibility of the witnesses by showing the relationship they had with Defendant and how they tended to corroborate with one another. The prosecutor pointed out that the witnesses knew Defendant "to the level of family," which would make their testimony all the more credible. The prosecutor also noted that Ricky and Robert both testified as to the extended clip attached to the gun that Defendant possessed. Their testimony, the prosecutor argued, was all the more credible because Ricky and Robert did not know that the same gun was given to Ronaldo and hidden under JoJo's mattress. The prosecutor went too far when he asserted that the witnesses were "telling the truth about it, because they saw it happen and because the Defendant frankly did it." However, while the prosecutor's statements were improper because they expressly vouched for the truthfulness of the witnesses, they were not so grossly improper to warrant a new trial.

C. Personal Belief of Defendant's Guilt

[4] Defendant contends that the court failed to intervene when the prosecutor proclaimed that Defendant was "absolutely guilty of the crime he's charged with" and that "[t]here's just no question about it." The prosecutor's statements were improper, but we conclude that they did not deprive Defendant of his right to a fair trial.

In *State v. Waring*, 364 N.C. 443, 500, 701 S.E.2d 615, 651 (2010), the defendant argued that the prosecutor injected his own personal opinion as to the defendant's guilt by stating "I believe the evidence is overwhelming that the defendant is guilty of first degree felony murder." Our Supreme Court rejected that argument and held that it is not grossly improper to discuss a defendant's culpability when the prosecutor's argument relates "the strength of the evidence to the theories under which [the] defendant [is] prosecuted" and in verdict sheets presented to the jury. *Id.* at 500, 701 S.E.2d at 651.

In this case, the prosecutor declared Defendant guilty, but only after reviewing the elements of felony gun possession and the evidence presented by the State. The prosecutor focused on the issues that were in question and what defense counsel would likely argue. The prosecutor's statement that Defendant was guilty followed his assessment of the strength of the State's witnesses, and did not suggest perceived personal knowledge. Thus, as stated in *Waring*, though the prosecutor's statements were "obviously improper," they did not rise to the level that required the trial court to intervene independently. *Id.* at 500, 701 S.E.2d at 651.

D. Matters Unsupported by the Evidence

[5] Defendant posits that the prosecutor made arguments on matters outside the record and unsupported by the evidence when he remarked that Defendant told Ronaldo to "man, get rid of this"—this being the gun. The prosecutor's statement in this regard was not improper.

Prosecutors are "given wide latitude in the scope of their argument," *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (citation omitted), and may argue any "inference[] that reasonably can be drawn from the evidence presented." *State v. Anderson*, 175 N.C. App 444, 453, 624 S.E.2d 393, 400 (2006). So long as the argument is "consistent with the record and does not travel into the fields of conjecture or personal opinion," the argument is not improper. *State v. Madonna*, __ N.C. App. __, __, 806 S.E.2d 356, 362 (2017) (quoting *State v. Small*, 328 N.C. 175, 184-85, 400 S.E.2d 413, 419 (1991)).

Ronaldo testified that Defendant gave him the gun and Detective Hudgins testified that Ronaldo told police that Defendant gave him the gun. Though Ronaldo did not say that Defendant expressly stated "man, get rid of this," the prosecutor's assertion fairly summarized the evidence and argued a reasonable inference arising from the testimony.

E. Accountability to Community

[6] Defendant's last argument is that the prosecutor impermissibly advocated that the jury's accountability to its community should compel a guilty verdict. Defendant takes issue with the following italicized portion of the State's closing argument:

> *What I really represent is people. . . . These people are -- some of them are known to you, your friends, your neighbors, your employers, co workers, that kind of thing. . . .* The reason I represent them is because *they have a right*

> *to know that when things like this happen, that the right thing happens in this courtroom. . . .*
>
> This kind of behavior that the Defendant exhibited on this particular night is dangerous. . . . *It causes people to have negative conclusions about this place in which we all live.* It could possibly potentially hurt or kill someone. . . .
>
> But he did do it himself and it is important for that reason to *my clients if you will, which is the State of North Carolina* for what they are, living, breathing people. The people who live here. . . . *This case matters to them.* Therefore, I hope it matters to you. . . .
>
> *I'm asking you, are you going to handle this unfinished business for me?*

(emphasis added). The above statements were not improper.

A prosecutor can argue that a jury is the "voice and conscience of the community," *State v. Brown*, 320 N.C. 179, 204, 358 S.E.2d 1, 18 (1987), and "may also ask the jury to 'send a message' to the community regarding justice." *State v. Barden*, 356 N.C. 316, 367, 572 S.E.2d 108, 140 (2002). A prosecutor must not ask or embolden the jury to "lend an ear to the community," such that the jury is speaking for the community or acting for the community's desires. *Id.* at 367, 572 S.E.2d at 140.

The statements here were standard opinions and assertions of fact that did not suggest the jury would be held accountable to the community. In *State v. Rogers*, 323 N.C. 658, 662 63, 374 S.E.2d 852, 855-56 (1989), our Supreme Court held there was no error in the prosecutor's argument that the community deserved to be safe, drug-free, and that young people should be warned about drug abuse. The Court concluded that such public policy opinions are widely held and are not improper. *Id.* at 663, 374 S.E.2d at 856. Here, the prosecutor stated he represented North Carolina and that the people of the State were essentially his clients. Defendant's alleged conduct adversely affected the community at large. The prosecutor argued that people in the community deserve to have justice occur in the courtroom. He argued that he hoped this case mattered enough to the jury to render a just conclusion. These remarks by the prosecutor were proper because they involved commonly held beliefs and merely attempted to motivate the jury to come to an appropriate conclusion, rather than to achieve a result based on the community's demands.

We are equally unpersuaded that the prosecutor's statement regarding "unfinished business" unfairly pressured the jury to curb a societal ill. In *Barden*, the prosecutor argued—over defense counsel's objection—that the jury would be doing a "disservice" to the community if the defendant was not sentenced to death. *Barden*, 356 N.C. at 367-68, 572 S.E.2d at 140-41. Our Supreme Court concluded that "the prosecutor did not contend that the community demanded defendant's execution," but instead asked the jury not to do a disservice to the community and concluded that the trial court did not abuse its discretion. *Id.* at 368, 572 S.E.2d at 141.

The same holds true in this case. The prosecutor did not urge that society or the community wanted Defendant punished, but requested, based on the evidence, the jury make an appropriate decision. Even assuming that the statement was improper, it was not grossly improper. Unlike in *Barden*, defense counsel in this case did not object at trial. Defendant cannot show a reasonable possibility that the result would have been different had the prosecutor not made the statement.

Conclusion

While we reject Defendant's arguments, we do not condone remarks by prosecutors that exceed statutory and ethical limitations. Derogatory comments, epithets, stating personal beliefs, or remarks regarding a witness's truthfulness reflect poorly on the propriety of prosecutors and on the criminal justice system as a whole. Prosecutors are given a wide berth of discretion to perform an important role for the State, and it is unfortunate that universal compliance with "seemingly simple requirements" are hindered by "some attorneys intentionally 'push[ing] the envelope' with their jury arguments." *Jones*, 355 N.C. at 127, 558 S.E.2d at 104. But, because Defendant has failed to overcome the high burden to prove that these missteps violated his due process rights, he is not entitled to relief.

NO ERROR.

Judges TYSON and BERGER concur.

TOWN OF PINEBLUFF, Plaintiff
v.
MOORE COUNTY, CATHERINE GRAHAM in her capacity as a County Commissioner, NICK PICERNO in his capacity as a County Commissioner, OTIS RITTER, in his capacity as a County Commissioner, RANDY SAUNDERS in his capacity as a County Commissioner, and JERRY DAEKE in his capacity as a County Commissioner, Defendants

No. COA17-286

Filed 2 October 2018

Zoning—extraterritorial jurisdiction—conflicting legislative action

The trial court properly entered summary judgment for plaintiff (Pinebluff) and issued a writ of mandamus ordering defendant (Moore County) to adopt a resolution authorizing Pinebluff's exercise of its extraterritorial jurisdiction. The case arose from a conflict between a law of general application, N.C.G.S. § 160A-360, and a local act, Session Law 1999-35, which abrogated the requirement of county approval. If reading a statutory scheme as a whole produces an irreconcilable conflict, the most recent provision should control and the session law was the most recent enactment.

Appeal by Defendants from Order granting summary judgment and writ of mandamus for Plaintiff entered 30 November 2016 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 20 September 2017.

Northen Blue, LLP, David M. Rooks, for plaintiff-appellee.

Misty Randall Leland, Moore County Attorney, for defendants-appellants.

MURPHY, Judge.

The disagreement between these local governments can be traced to a conflict between a law of general application and a local bill: North Carolina's extraterritorial jurisdiction statute (codified at N.C.G.S. § 160A-360) and a local act pertaining to the exercise of territorial jurisdiction by the Town of Pinebluff (Senate Bill 433 enacted in 1999 as Session Law 1999-35). Between 2014-2015, Pinebluff sought to expand its extraterritorial jurisdiction and, pursuant to the aforementioned local act, informed Moore County of its intent to do so. Moore County refused to adopt a resolution authorizing Pinebluff's extraterritorial jurisdiction

expansion and cited the above General Statute in support of its position. Pinebluff then sued Moore County and sought a writ of mandamus to compel the County Commissioners to approve the town's proposed extraterritorial jurisdiction expansion. The trial court ruled in favor of Pinebluff and entered an order directing the Moore County Commissioners to approve Pinebluff's extraterritorial jurisdiction expansion.

We conclude that the local act, codified in N.C. Session Law 1999-35, abrogated the requirement of county approval and requires Moore County to summarily approve any otherwise lawful extraterritorial jurisdiction expansion request by Pinebluff. As a result, we affirm the trial court's order granting summary judgment and writ of mandamus.

BACKGROUND

Pinebluff is a municipal corporation located in Moore County. The underlying facts are not in dispute, but the parties dispute the construction of N.C.G.S. § 160A-360 as a result of N.C. Session Law. 1999-35 as it pertains to Pinebluff's extraterritorial zoning jurisdiction.

Pinebluff adopted an ordinance extending its corporate limits that became effective on 19 July 2007. On 16 October 2014, Pinebluff adopted a resolution to extend its ETJ into a portion of Moore County as authorized by N.C.G.S. § 160A-360(a). On 28 October 2014, Pinebluff sent a copy of the 16 October 2014 resolution to the Chairman of the Moore County Commissioners, requesting that the County adopt an appropriate resolution allowing Pinebluff to exercise extraterritorial jurisdiction within two miles of the limits of the 19 July 2007 annexation. In its request, Pinebluff indicated that N.C. Session Law 1999-35, a local bill modifying N.C.G.S. § 160A-360 with respect to Pinebluff, required the County to adopt such a resolution.

Defendants did not reply to Pinebluff's first request. Pinebluff sent a second request on 18 February 2015. In response, the Chairman of the County Commissioners met with Pinebluff's Mayor, along with the parties' respective staff and counsel. Defendants indicated their belief that S.L. 1999-35 did not obligate them to approve the request because the session law is subject to restriction by N.C.G.S. § 160A-360(e), which was not amended and must be read in harmony with the entire statute.

N.C.G.S. § 160A-360, as modified by S.L. 1999-35, provides:

> (a) All of the powers granted by this Article may be exercised by any city within its corporate limits. In addition, any city may exercise these powers within a defined area extending not more than one mile beyond its limits. With

the approval of the board or boards of county commissioners with jurisdiction over the area, a city of 10,000 or more population but less than 25,000 may exercise these powers over an area extending not more than two miles beyond its limits and a city of 25,000 or more population may exercise these powers over an area extending not more than three miles beyond its limits. The boundaries of the city's extraterritorial jurisdiction shall be the same for all powers conferred in this Article. No city may exercise extraterritorially any power conferred by this Article that it is not exercising within its corporate limits. In determining the population of a city for the purposes of this Article, the city council and the board of county commissioners may use the most recent annual estimate of population as certified by the Secretary of the North Carolina Department of Administration. *The Town of Pinebluff may exercise the powers granted by this Article for a distance not more than two miles beyond its corporate limits, without regard to the population limit of this section.*

(a1) Any municipality planning to exercise extraterritorial jurisdiction under this Article shall notify the owners of all parcels of land proposed for addition to the area of extraterritorial jurisdiction, as shown on the county tax records. The notice shall be sent by first-class mail to the last addresses listed for affected property owners in the county tax records. The notice shall inform the landowner of the effect of the extension of extraterritorial jurisdiction, of the landowner's right to participate in a public hearing prior to adoption of any ordinance extending the area of extraterritorial jurisdiction, as provided in G.S. 160A-364, and the right of all residents of the area to apply to the board of county commissioners to serve as a representative on the planning board and the board of adjustment, as provided in G.S. 160A-362. The notice shall be mailed at least four weeks prior to the public hearing. The person or persons mailing the notices shall certify to the city council that the notices were sent by first-class mail, and the certificate shall be deemed conclusive in the absence of fraud.

(b) Any council wishing to exercise extraterritorial jurisdiction under this Article shall adopt, and may amend

from time to time, an ordinance specifying the areas to be included based upon existing or projected urban development and areas of critical concern to the city, as evidenced by officially adopted plans for its development. Boundaries shall be defined, to the extent feasible, in terms of geographical features identifiable on the ground. A council may, in its discretion, exclude from its extraterritorial jurisdiction areas lying in another county, areas separated from the city by barriers to urban growth, or areas whose projected development will have minimal impact on the city. The boundaries specified in the ordinance shall at all times be drawn on a map, set forth in a written description, or shown by a combination of these techniques. This delineation shall be maintained in the manner provided in G.S. 160A-22 for the delineation of the corporate limits, and shall be recorded in the office of the register of deeds of each county in which any portion of the area lies.

(c) Where the extraterritorial jurisdiction of two or more cities overlaps, the jurisdictional boundary between them shall be a line connecting the midway points of the overlapping area unless the city councils agree to another boundary line within the overlapping area based upon existing or projected patterns of development.

(d) If a city fails to adopt an ordinance specifying the boundaries of its extraterritorial jurisdiction, the county of which it is a part shall be authorized to exercise the powers granted by this Article in any area beyond the city's corporate limits. The county may also, on request of the city council, exercise any or all these powers in any or all areas lying within the city's corporate limits or within the city's specified area of extraterritorial jurisdiction.

(e) No city may hereafter extend its extraterritorial powers under this Article into any area for which the county at that time has adopted and is enforcing a zoning ordinance and subdivision regulations and within which it is enforcing the State Building Code. However, the city may do so where the county is not exercising all three of these powers, or when the city and the county have agreed upon the area within which each will exercise the powers conferred by this Article.

(f) When a city annexes, or a new city is incorporated in, or a city extends its jurisdiction to include, an area that is currently being regulated by the county, the county regulations and powers of enforcement shall remain in effect until (i) the city has adopted such regulations, or (ii) a period of 60 days has elapsed following the annexation, extension or incorporation, whichever is sooner. During this period the city may hold hearings and take any other measures that may be required in order to adopt its regulations for the area. *When the Town of Pinebluff annexes any area outside its corporate limits thus extending the area over which it would be allowed under subsection (a) of this section to exercise the powers granted by this Article, upon presenting proper evidence to the County Board of Commissioners that the annexation has been accomplished, the County Board of Commissioners shall adopt a resolution authorizing the Town to exercise these powers within the extended area thus described.*

(f1) When a city relinquishes jurisdiction over an area that it is regulating under this Article to a county, the city regulations and powers of enforcement shall remain in effect until (i) the county has adopted this regulation or (ii) a period of 60 days has elapsed following the action by which the city relinquished jurisdiction, whichever is sooner. During this period the county may hold hearings and take other measures that may be required in order to adopt its regulations for the area.

(g) When a local government is granted powers by this section subject to the request, approval, or agreement of another local government, the request, approval, or agreement shall be evidenced by a formally adopted resolution of that government's legislative body. Any such request, approval, or agreement can be rescinded upon two years' written notice to the other legislative bodies concerned by repealing the resolution. The resolution may be modified at any time by mutual agreement of the legislative bodies concerned.

(h) Nothing in this section shall repeal, modify, or amend any local act which defines the boundaries of a city's

extraterritorial jurisdiction by metes and bounds or courses and distances.

(i) Whenever a city or county, pursuant to this section, acquires jurisdiction over a territory that theretofore has been subject to the jurisdiction of another local government, any person who has acquired vested rights under a permit, certificate, or other evidence of compliance issued by the local government surrendering jurisdiction may exercise those rights as if no change of jurisdiction had occurred. The city or county acquiring jurisdiction may take any action regarding such a permit, certificate, or other evidence of compliance that could have been taken by the local government surrendering jurisdiction pursuant to its ordinances and regulations. Except as provided in this subsection, any building, structure, or other land use in a territory over which a city or county has acquired jurisdiction is subject to the ordinances and regulations of the city or county.

(j) Repealed by Session Laws 1973, c. 669, s. 1.

(k) As used in this subsection, "bona fide farm purposes" is as described in G.S. 153A-340. As used in this subsection, "property" means a single tract of property or an identifiable portion of a single tract. Property that is located in the geographic area of a municipality's extraterritorial jurisdiction and that is used for bona fide farm purposes is exempt from exercise of the municipality's extraterritorial jurisdiction under this Article. Property that is located in the geographic area of a municipality's extraterritorial jurisdiction and that ceases to be used for bona fide farm purposes shall become subject to exercise of the municipality's extraterritorial jurisdiction under this Article. For purposes of complying with 44 C.F.R. Part 60, Subpart A, property that is exempt from the exercise of extraterritorial jurisdiction pursuant to this subsection shall be subject to the county's floodplain ordinance or all floodplain regulation provisions of the county's unified development ordinance.

(l) A municipality may provide in its zoning ordinance that an accessory building of a "bona fide farm" as defined by G.S. 153A-340(b) has the same exemption from the building

> code as it would have under county zoning as provided by Part 3 of Article 18 of Chapter 153A of the General Statutes.
>
> This subsection applies only to the City of Raleigh and the Towns of Apex, Cary, Fuquay-Varina, Garner, Holly Springs, Knightdale, Morrisville, Rolesville, Wake Forest, Wendell, and Zebulon.

N.C.G.S. § 160A-360 (emphasis added); S.L. 1999-35.

Defendants maintain that, under N.C.G.S. § 160A-360, they were not required to approve Pinebluff's request because Moore County adopted and is enforcing a zoning ordinance and subdivision regulations and is enforcing the State Building Code within Pinebluff's proposed extraterritorial expansion area. Based on the premise that S.L. 1999-35 does not invalidate N.C.G.S. § 160A-360(e) as applied to Pinebluff, Defendants informed Pinebluff that it would have to obtain Defendants' approval to extend its extraterritorial jurisdiction, which requires Pinebluff go through Defendants' public hearing process as defined in Moore County's Unified Development Ordinance.

In accordance with Moore County's Unified Development Ordinance, Moore County's Planning Board held a public hearing and recommended that Defendants deny the extension request. The Planning Board noted that no one at the meeting spoke in favor of the request. The Board of Commissioners later held a public hearing before voting on the request and observed that no one spoke in favor of the request and that nine people spoke against it. The Board of Commissioners voted 5-0 to deny Pinebluff's request.

On 21 January 2016, Pinebluff filed a *Complaint and Petition for Writ of Mandamus* against Defendants, arguing that S.L. 1999-35 required Defendants to approve their extension request. Defendants filed an *Answer*, *Motion to Dismiss and Motion for Judgment on the Pleadings Pursuant to N.C. Rules of Civil Procedure 12(b)(6) and 12(c)*. Later, Pinebluff filed a motion for summary judgment with a contemporaneously filed affidavit. After a hearing, the trial court entered an order allowing Pinebluff's motion for summary judgment and petition for writ of mandamus and denying Defendants' motion to dismiss and motion for judgment on the pleadings. The order directed Defendants "to adopt a resolution authorizing [Pinebluff] to exercise its extraterritorial zoning jurisdiction within the area [Pinebluff] requested in its resolution adopted October 16, 2014." Defendants timely appealed.

ANALYSIS

Defendants argue that the trial court erred in granting Pinebluff's motion for summary judgment and issuing a writ of mandamus.[1] After careful examination of the statute as amended and consideration of the canons of construction applicable here, we affirm the trial court's disposition of this matter.

Defendants interpret N.C.G.S. § 160A-360(a) and S.L. 1999-35 to require that Pinebluff obtain Defendants' approval to extend its extraterritorial jurisdiction beyond one mile. Defendants also contend that N.C.G.S. § 160A-360(e), notwithstanding N.C.G.S. § 160A-360(f) as amended by S.L. 1999-35, prohibits Pinebluff from extending its extraterritorial jurisdiction into an area where Moore County is exercising all three powers set out in N.C.G.S. § 160A-360(e).

As Pinebluff and Defendants dispute the construction of S.L. 1999-35, we must determine whether, by adopting S.L. 1999-35, the General Assembly intended to require Moore County to rubber stamp any resolutions authorizing Pinebluff to exercise its extraterritorial zoning jurisdiction upon Pinebluff's presentation of proper evidence of annexation, even if Moore County is exercising all three powers listed in N.C.G.S. § 160A-360(e). After examining the statute and enactment of S.L. 1999-35, we agree with Pinebluff and hold that the General Assembly intended to remove all discretion from Moore County to oppose an extension of Pinebluff's extraterritorial jurisdiction.

We review an order granting summary judgment de novo. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Summary judgment is only appropriate when the record demonstrates that "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* (quoting N.C.G.S. § 1A-1, N.C. R. Civ. P. 56(c)).

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1. Defendants have attempted to appeal the denial of the motion to dismiss and motion for judgment on the pleadings. However, we note that neither of these issues are appealable. *See Whitaker v. Clark*, 109 N.C. App. 379, 427 S.E.2d 142 (1993) (finding that generally, appeal from denial of a motion for judgment on the pleadings "does not lie" with the Court of Appeals absent an interlocutory appeal that affects a substantial right); *Drain v. United Servs. Life Ins. Co.*, 85 N.C. App. 174, 176, 354 S.E.2d 269, 271 (1987) ("[W]here an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case thereupon proceeds to judgment on the merits, the unsuccessful movant may not on an appeal from the final judgment seek review of the denial of the motion to dismiss."). Accordingly, the only issue on appeal is whether summary judgment was properly granted for Pinebluff.

In ensuring that the legislative intent is accomplished, "we are guided by the structure of the statute and certain canons of statutory construction." *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). Our Supreme Court has previously observed that "[s]tatutory interpretation properly begins with an examination of the plain words of the statute." *Lanvale Props., LLC v. Cty. of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 809-10 (2012) (quoting *Three Guys Real Estate v. Harnett Cty.*, 345 N.C. 468, 472, 480 S.E.2d 681, 683 (1997)). "Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *N.C. DOT v. Mission Battleground Park, DST*, __ N.C __, __, 810 S.E.2d 217, 222 (2018) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)).

We "presume[] that the Legislature acted with full knowledge of prior and existing law." *See Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977). Moreover, "[a]mendments are presumed not to be without purpose." *Pine Knoll Shores v. Evans*, 331 N.C. 361, 366, 416 S.E.2d 4, 7 (1992). When only part of a statute is amended, we view the unmodified provisions "simply as a reenactment, except as to the new provision, which is to take effect from the time of the amendment." *State v. Mull*, 178 N.C. 748, 752, 101 S.E. 89, 91 (1919).

Although the *in pari materia* canon of statutory interpretation clearly applies to the interpretation of conflicting provisions within different statutes that address the same subject matter, *State ex rel. Comm'r of Ins. v. N.C. Fire Insurance Rating Bureau*, 292 N.C. 70, 76, 231 S.E.2d 882, 886 (1977), its principles along with the whole-text canon guide us when there is a conflict between two provisions of the same statute. If reading a statutory scheme as a whole produces an "irreconcilable conflict," by which two conflicting provisions cannot be given independent meaning, the more recent provision should control. *See Greensboro v. Guilford Cty.*, 191 N.C. 584, 588, 132 S.E. 558, 559 (1926) ("It is well settled that a special or local law repeals an earlier general law to the extent of any irreconcilable conflict between their provisions, or speaking more accurately, it operates to engraft on the general statute an exception to the extent of the conflict.") (quoting 25 *Ruling Case Law* 929 (William M. McKinney & Burdett A. Rich eds., 1919)).

Here, the text of S.L. 1999-35 makes clear that the General Assembly intended to replace § 160A-360(a) and § 160A-360(f) with the modified provisions in S.L. 1999-35, while leaving the rest of N.C.G.S. §160A-360

intact. Once we read the statute as a whole and combine S.L. 1999-35 with the unmodified portion of N.C.G.S. §160A-360, two of the provisions conflict with each other: N.C.G.S. § 160A-360(e) prohibits a city's exercise of extraterritorial jurisdiction within an area where the county is exercising the three powers enumerated therein, whereas N.C.G.S. § 160A-360(f) as amended by S.L. 1999-35 provides that Moore County "shall adopt a resolution authorizing [Pinebluff] to exercise these powers within the extended area thus described." S.L. 1999-35 is silent about the applicability or inapplicability of N.C.G.S. § 160A-360(e) to the specific authorization for Pinebluff in N.C.G.S. § 160A-360(f). Defendants' favored interpretation focuses on the commands of N.C.G.S. § 160A-360(e), whereas Pinebluff argues that N.C.G.S. § 160A-360(f) invalidates the effect that N.C.G.S. § 160A-360(e) otherwise would have on Pinebluff's proposed exercise of extraterritorial jurisdiction.

For the following reasons, we conclude that there is an "irreconcilable conflict" between N.C.G.S. § 160A-360(e) and N.C.G.S. § 160A-360(f) as applied to Pinebluff. *See State v. Hutson*, 10 N.C. App. 653, 657, 179 S.E.2d 858, 861 (1971) ("Statutes *in pari materia*, although in apparent conflict or containing apparent inconsistencies, should, as far as reasonably possible, be construed in harmony with each other so as to give force and effect to each . . . ."). However, here, it is not possible to construe these provisions in harmony with one another.

N.C.G.S. § 160A-360(a), as modified by S.L. 1999-35, provides that Pinebluff need not meet the population requirement to exercise extraterritorial jurisdiction for up to two miles beyond its corporate limits.[2] A town of Pinebluff's size could otherwise exercise extraterritorial jurisdiction only within one mile beyond its corporate limits. N.C.G.S. § 160A-360(a) ("[A]ny city may exercise these powers within a defined area extending not more than one mile beyond its limits. With the approval of the board or boards of county commissioners with jurisdiction over the area, a city of 10,000 or more population but less than 25,000 may exercise these powers over an area extending not more than two miles beyond its limits . . . ."). Defendants contend that Pinebluff must still obtain its approval to exercise extraterritorial jurisdiction in the areas more than one mile beyond Pinebluff's corporate limit.

Defendants' interpretation is inconsistent with the plain language of S.L. 1999-35. S.L. 1999-35 provides that "[t]he Town of Pinebluff may

2. "The Town of Pinebluff may exercise the powers granted by this Article for a distance not more than two miles beyond its corporate limits, without regard to the population limit of this section." S.L.1999-35 (emphasis in original).

exercise the powers granted by this Article for a distance not more than two miles beyond its corporate limits, without regard to the population limit of this section." N.C.G.S. § 160A-360(a) contains a provision by which cities of more than 10,000 people but fewer than 25,000 may extend their exterritorial jurisdiction for up to two miles with approval from the county commissioners. However, the approval process in this provision is not required here because S.L. 1999-35 exempts Pinebluff from the population requirement that is otherwise a prerequisite in the process of extending the boundaries of a city's extraterritorial jurisdiction without county approval.

On its own, N.C.G.S. § 160A-360(a) as amended by S.L. 1999-35 does not imply that Pinebluff enjoys unrestricted exercise of its extraterritorial jurisdiction within two miles of its corporate limits. Because the General Assembly did not modify N.C.G.S. § 160A-360(e) in S.L. 1999-35, N.C.G.S. § 160A-360(e) limits the application of N.C.G.S. § 160A-360(a). Our Supreme Court has recognized that N.C.G.S. § 160A-360(e) prohibits a city's exercise of extraterritorial jurisdiction in an area where the county is exercising the three enumerated functions—even if a city seeks extraterritorial jurisdiction *within* the one-mile limit provided by N.C.G.S. § 160A-360(a). *See Town of Boone v. State*, 369 N.C. 126, 128 n.1, 794 S.E.2d 710, 712 n.1 (2016) ("Even when a municipality wishes to exercise extraterritorial jurisdiction in an area within one mile of its corporate limits, county approval is required if the county is already enforcing zoning ordinances, subdivision regulations, and the State Building Code in that area."). In other words, even though a city does not otherwise need the county's approval to exercise its extraterritorial jurisdiction within one mile[3] of its corporate limits under N.C.G.S. § 160A-360(a), N.C.G.S. § 160A-360(e) acts as a limit on this authority under certain circumstances.

If S.L. 1999-35 contained only the above modification to N.C.G.S. § 160A-360(a), the existence of N.C.G.S. § 160A-360(e) in the general statutory scheme would clearly demonstrate that Defendants retain the discretion to follow their own discretion and/or consider the will of their constituents as expressed at a hearing under N.C.G.S. § 160A-360(a1) and disapprove of Pinebluff's request to exercise extraterritorial jurisdiction

3. N.C.G.S. § 160A-360(a) provides that "any city may exercise these powers within a defined area extending not more than one mile beyond its limits." In other cases, a city's exercise of extraterritorial jurisdiction does not require county approval unless N.C.G.S. § 160A-360(e) applies. Here, because of S.L. 1999-35, Pinebluff has authority to exercise its extraterritorial jurisdiction for up to two miles beyond its corporate limits without Moore County's approval.

within the two-mile boundary provided by N.C.G.S. § 160A-360(a). If S.L. 1999-35 amended only N.C.G.S. § 160A-360(a), the potential additional mile of extraterritorial jurisdiction would not affect our application of our Supreme Court's observation in *Town of Boone*, where the Court recognized that N.C.G.S. § 160A-360(a) is subject to N.C.G.S. § 160A-360(e). *See Town of Boone*, 369 N.C. at 128 n.1, 794 S.E.2d at 712 n.1.

However, the General Assembly also amended the language of N.C.G.S. § 160A-360(f) with S.L. 1999-35. Because "amendments are presumed not to be without purpose," we must determine how the amendment to N.C.G.S. § 160A-360(f) alters the town's or county's authority. *See Pine Knoll Shores*, 331 N.C. at 366, 416 S.E.2d at 7. Under Defendants' reading of N.C.G.S. § 160A-360(f), the modification to N.C.G.S. § 160A-360(f) serves to reinforce the General Assembly's above amendment to N.C.G.S. § 160A-360(a), which is unambiguous on its own. We are not persuaded by Defendants' reading of N.C.G.S. § 160A-360(f).

Because N.C.G.S. § 160A-360(a) clearly authorizes Pinebluff to exercise its extraterritorial jurisdiction within two miles of its corporate limit without county approval, subject to N.C.G.S. § 160A-360(e), the amendment to N.C.G.S. § 160A-360(f) must affect the scope of Defendants' discretion in some other way. The plain language of N.C.G.S. § 160A-360(f), as modified by S.L. 1999-35, is clear: Defendants do not retain the discretion to disapprove of Pinebluff's requests to exercise its extraterritorial jurisdiction within the two-mile limit authorized by the above alteration to N.C.G.S. § 160A-360(a). N.C.G.S. § 160A-360(f), as modified by S.L. 1999-35, provides that Pinebluff can exercise extraterritorial jurisdiction within two miles of its corporate limits, as allowed by N.C.G.S. § 160A-360(a), even if Moore County is exercising the three powers described in N.C.G.S. § 160A-360(e).

If N.C.G.S. § 160A-360(f) as amended did not operate to invalidate the discretion otherwise retained by Defendants under N.C.G.S. § 160A-360(e), N.C.G.S. § 160A-360(f) as amended would have no effect at all. As discussed above, N.C.G.S. § 160A-360(a) as amended by S.L. 1999-35 states that Pinebluff can exercise extraterritorial jurisdiction within two miles of its corporate limits, and our Supreme Court has interpreted N.C.G.S. § 160A-360(e) as a general exception to this authority. *See Town of Boone*, 369 N.C. at 128 n.1, 794 S.E.2d at 712 n.1. It follows that, where N.C.G.S. § 160A-360(e) *does not* apply, a city can exercise its extraterritorial jurisdiction within the limits set out by N.C.G.S. § 160A-360(a), and a county has no discretion to limit a city's otherwise lawful exercise of extraterritorial jurisdiction.

As a result, even without N.C.G.S. § 160A-360(f) as amended by S.L. 1999-35, N.C.G.S. § 160A-360(a) authorizes Pinebluff to exercise its extraterritorial jurisdiction within two miles of its corporate limits where N.C.G.S. § 160A-360(e) does not apply. Defendants have no discretion to limit Pinebluff's exercise of extraterritorial jurisdiction where Moore County is not exercising the three powers described in N.C.G.S. § 160A-360(e). Because the General Assembly amended N.C.G.S. § 160A-360(f) in addition to N.C.G.S. § 160A-360(a), each must have independent meaning. N.C.G.S. § 160A-360(f) clearly removes some of Defendants' discretion to deny Pinebluff's requests to extend its extraterritorial jurisdiction, and N.C.G.S. § 160A-360(e) is the only source of such discretion.

Because N.C.G.S. § 160A-360(e) and N.C.G.S. § 160A-360(f) as amended by S.L. 1999-35 are inconsistent with one another, we must determine which provision controls here. "Where two statutes are thus in conflict and cannot reasonably be reconciled, the latter one repeals the one of earlier date to the extent of the repugnance." *Guilford Cty.*, 191 N.C. at 588, 132 S.E. at 559. (quoting *State v. Kelly*, 186 N.C. 365, 371–72, 119 S.E. 755, 759 (1923)). Although our Supreme Court in *Guilford County* managed to reconcile the conflicting provisions in that case, we have shown above that no such interpretation is tenable here. Therefore, we conclude that "the last enactment must prevail . . . ." *See Guilford Cty. v. Estates Admin., Inc.*, 212 N.C. 653, 655, 194 S.E. 295, 296 (1937). The General Assembly enacted N.C.G.S. § 160A-360(e) in 1971. S.L. 1971-698. The General Assembly enacted S.L. 1999-35 in 1999. Accordingly, we hold that S.L. 1999-35's amendment of N.C.G.S. § 160A-360(f) operates to invalidate the applicability of N.C.G.S. § 160A-360(e) with regard to Pinebluff.

CONCLUSION

We conclude that S.L. 1999-35, being the most recent enactment, operates to invalidate the applicability of N.C.G.S. § 160A-360(e) with regard to Pinebluff. Therefore, Moore County did not have discretion to withhold passing a resolution regarding Pinebluff's extraterritorial jurisdiction. Accordingly, we affirm the trial court's entry of summary judgment in favor of Pinebluff and the writ of mandamus requiring Moore County to adopt a resolution authorizing Pinebluff to exercise its extraterritorial jurisdiction within the area identified by the 16 October 2014 Pinebluff resolution.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

GLORIA R. WATLINGTON, PETITIONER
v.
DEPARTMENT OF SOCIAL SERVICES ROCKINGHAM COUNTY, RESPONDENT

No. COA17-1176

Filed 2 October 2018

Public Officers and Employees—social services worker—dismissal—just cause

An administrative law judge correctly determined that a department of social services (respondent) had just cause to terminate the employment of a social services technician (petitioner) who provided transportation for children who were under the agency's supervision, supervised parental visits, and reported the details of visits to social workers. Petitioner accepted a gift of jewelry from a foster child through a parent, allowed parents and/or children to buy her food, bought items for herself using money intended for a child's group home, accepted cash from a parent, and gave a bassinet to a foster parent without permission. Petitioner was notified in a termination letter that respondent believed she had engaged in unacceptable personal conduct, and she was given an opportunity in a contested case hearing to dispute whether those specific acts occurred as a matter of fact and whether they constituted unacceptable personal conduct as a matter of law.

Appeal by Petitioner from Final Decision entered 12 July 2017 by Administrative Law Judge J. Randall May in the Office of Administrative Hearings. Heard in the Court of Appeals 7 March 2018.

Mark Hayes for Petitioner-Appellant.

Rockingham County Attorney's Office, by Emily Sloop, for Respondent-Appellee.

INMAN, Judge.

An administrative law judge did not err in concluding that a county social services worker's acts of misconduct—including borrowing money and accepting gifts from the parents of children in her care—constituted just cause for termination of her employment.

Petitioner Gloria R. Watlington ("Ms. Watlington") appeals from a final agency decision affirming the termination of her employment by

the Rockingham County Department of Social Services ("RCDSS"). After careful review of the record and applicable law, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Ms. Watlington worked for RCDSS as a Community Social Services Technician from 2012 until she was fired on 15 December 2015. Her job responsibilities included transporting children under RCDSS supervision; supervising case visits by parents with children under RCDSS supervision; and reporting the details of such visits to social workers assigned to the cases.

When she was hired, Ms. Watlington was informed of the Rockingham County Personnel Policy, which included a provision prohibiting employees from accepting gifts or favors and engaging in other unacceptable personal conduct.

On 9 December 2015, Ms. Watlington was placed on administrative leave with pay after she disclosed to coworkers that she had accepted a gift at the conclusion of a case visit. Two days later, the director of RCDSS conducted a pre-disciplinary/dismissal conference attended by Ms. Watlington and her supervisor. On 14 December, RCDSS notified Ms. Watlington in writing that her employment was being terminated immediately based on five instances of "unacceptable personal conduct" in violation of the Rockingham County Personnel Policy. The notice cited the following conduct by Ms. Watlington: (1) accepting a gift of jewelry from a foster child through a parent; (2) allowing parents and/or children under her supervision to buy food for Ms. Watlington; (3) buying herself items using money intended to be provided to a child's group home; (4) accepting a cash loan from a foster parent under her supervision; and (5) giving a bassinet to a foster parent without permission.

Ms. Watlington immediately appealed her termination. The next day, 15 December 2015, the County Manager upheld the termination and notified Ms. Watlington of his decision in a letter. Ms. Watlington timely filed a Petition for Contested Case Hearing with the North Carolina Office of Administrative Hearings.

Evidence and argument in the contested case were presented to Administrative Law Judge J. Randall May ("the ALJ") on 23 May 2016. The ALJ issued a final decision on 5 July 2016 affirming the termination of Ms. Watlington's employment but ordering RCDSS to pay her back pay for a procedural violation of the North Carolina Administrative Code.

Both parties appealed to this Court. In *Watlington v. Department of Social Services of Rockingham County*, ___ N.C. App. ___, 799 S.E.2d

396 (2017) ("*Watlington I*"), we affirmed the ALJ's finding that Ms. Watlington had engaged in conduct as alleged by RCDSS and the ALJ's conclusion that RCDSS could terminate Ms. Watlington's employment only for just cause, but we otherwise concluded that the ALJ's decision was in error.[1] We held that the ALJ had failed to make appropriate findings of fact or conclusions of law to allow appellate review of the just cause determination and remanded the matter for the ALJ to make such findings. We also reversed the ALJ's award of back pay to Ms. Watlington and remanded for the ALJ to determine whether RCDSS violated procedure and, if it did, to order a remedy provided by the appropriate subchapter of the North Carolina Administrative Code.

The ALJ heard oral arguments on remand on 1 June 2017 and issued a final decision on remand on 12 July 2017. The final decision affirmed the termination of Ms. Watlington's employment and concluded that RCDSS had not violated any procedural requirement in the process of firing her. Ms. Watlington timely appealed to this Court.

DISCUSSION

I. Standards of Review

Section 150B-51 of our General Statutes governs our standard of review of an administrative agency decision such as this. The statute provides different standards of review depending on the issues challenged on appeal. "[Q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894-95 (2004) (citation omitted). Factual findings that are not challenged on appeal are presumed to be supported by competent evidence and cannot be disturbed by this Court. *Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 210, 784 S.E.2d 509, 519 (2016); *see also N.C. State Bar v. Ely*, ___ N.C. App. ___, ___, 810 S.E.2d 346, 351 (2018) (noting on whole-record review of an agency decision that "unchallenged findings are binding on appeal" (citation omitted)).

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1. This Court in *Watlington* I held that the ALJ had incorrectly applied Subchapter J, of the North Carolina Administrative Code to Ms. Watlington's appeal, because her employment was governed by Subchapter I. We reversed the ALJ's conclusions of law and remanded for reconsideration, findings, and conclusions of law applying the correct subchapter.

II. Analysis

In *Watlington I*, this Court held that the ALJ had correctly articulated a three-part test to determine whether RCDSS had just cause to terminate Ms. Watlington's employment. *Watlington I*, ___ N.C. App. at ___, 799 S.E.2d at 404. The test, established by this Court's decision in *Warren v. North Carolina Department of Crime Control and Public Safety*, 221 N.C. App. 376, 726 S.E.2d 920 (2012), requires the trial court to determine: (1) whether the employee engaged in the conduct alleged by the employer; (2) whether the conduct falls within one of the categories of unacceptable personal conduct provided in the North Carolina Administrative Code; and (3) whether the conduct "amounted to just cause for the disciplinary action taken." *Id.* at 382-83, 726 S.E.2d at 925.

Watlington I also held that the ALJ's final decision adequately addressed the first prong of the *Warren* test in its Finding of Fact 13, noting that because the finding was not disputed by either party, it is binding on appeal. *Watlington I*, ___ N.C. App. at ___, 799 S.E.2d at 404. On remand, the trial court made the same finding of fact, *verbatim*, which is also undisputed by either party and similarly binding here. *Blackburn*, 246 N.C. App. at 210, 784 S.E.2d at 519.

Finding of Fact 13 establishes the following:

> While employed by [RCDSS], [Watlington] engaged in the following conduct: (1) accepted a loan in the amount of sixty dollars ($60.00) offered by a foster parent between two (2) and three (3) years prior to her termination by [RCDSS]; (2) used approximately six dollars ($6.00) of a minor child's money to purchase food for herself while transporting the minor child across the state at the request of her supervisor, which [Watlington] repaid to [RCDSS] within one (1) week; (3) consumed leftover food purchased by a foster parent for herself and a minor child when offered by the foster parent; (4) gifted a bassinet to a foster family being served by [RCDSS] from an area where [RCDSS] keeps both donations and property assigned to particular families under its supervision; [sic] and upon being notified of a problem, retrieved said bassinet and returned it to [RCDSS]; (5) accepted a slice of cake or cupcakes offered by a foster family at a minor child's birthday party; and (6) accepted a wrapped pair of earrings from a foster parent on behalf of her child, which was immediately returned upon issue [sic] raised by [RCDSS].

The issues before us concern whether the undisputed misconduct, or any of it, falls within a category identified by the Administrative Code as unacceptable personal conduct, and if so, whether that unacceptable personal conduct justified termination of Ms. Watlington's employment, as opposed to lesser disciplinary action.

A. Unacceptable Personal Conduct

Title 25, Chapter 1, Subchapter I of the North Carolina Administrative Code identifies nine categories of unacceptable personal conduct. 25 N.C. Admin. Code 01I.2304(b)(1)-(9). The ALJ concluded that all but one incident of Ms. Watlington's misconduct fell within Category (4): "the willful violation of a known or written work rule." He further concluded that one or more other incidents fell within other categories of unacceptable personal conduct enumerated in 25 N.C. Admin. Code 01I.2304(b).[2]

Ms. Watlington argues that conclusions concerning other categories outside of "willful violation of known or written work rules," were improperly made, as the only punishable conduct cited in RCDSS's termination letter amounted to violations of the Rockingham County Personnel Policy. In order to dismiss a state employee in service to local government, the law requires agency management to provide the employee with "a written letter of dismissal containing the specific reasons for dismissal" following a pre-dismissal conference. 25 N.C. Admin. Code 1I.2308(4)(f). As Ms. Watlington construes the law and the termination letter, RCDSS failed to specify any grounds for termination beyond violation of a written rule, and the ALJ's conclusions of law that her conduct also fell within other categories of unacceptable personal conduct were beyond the scope of the proceeding. We disagree.

The termination letter describes, in detail, the "specific reasons for dismissal." 25 N.C. Admin. Code 1I.2308(f). The letter begins by stating that Ms. Watlington was dismissed "as a result of [her] unacceptable personal conduct." It then recounts the issues presented at the pre-dismissal conference:

> During the conference, we discussed the following concerns:
>
> 1) Violation of Rockingham County Personnel Policy Article V, Conditions of Employment, Section 3, Gifts and Favors, Item (A) in that

2. These other categories were: (5) "conduct unbecoming an employee that is detrimental to the agency's service;" (6) "the abuse of client(s) . . . or a person(s) over whom the employee has charge or to whom the employee has a responsibility;" and (8) "insubordination."

> • The employee accepted a gift of jewelry from foster children/biological parent
>
> • The employee allowed parents/minor children in foster care to purchase the employee food and/or beverages on more than one occasion
>
> • The employee used money belonging to a child in foster care to purchase items for herself, knowing that the funds were the child's SSI monies intended for the group home.
>
> • The employee accepted cash monies from a foster parent.
>
> 2) Violation of Rockingham County Personnel Policy Article V, Conditions of Employment, Section 3, Gifts and Favors, Item (A) in that
>
> • The employee, without permission, gifted a bassinet to a family being served by DSS

From there, the letter includes "Findings" that Ms. Watlington admitted to each specific act enumerated above, followed by the "Conclusion" that dismissal was in the best interest of Rockingham County. By stating in the letter that Ms. Watlington was being dismissed for "unacceptable personal conduct" and subsequently detailing which specific acts RCDSS considered to be within the meaning of that term, it complied with 25 N.C. Admin. Code 1I.2308(f). The ALJ was subsequently permitted to make necessary conclusions of law as to whether and how the specific alleged acts amounted to "unacceptable personal conduct" within the meaning of 25 N.C. Admin. Code 1I.2304(b).

Despite recitation of the specific acts constituting unacceptable personal conduct in the termination letter, Ms. Watlington posits that she was without sufficient notice to mount a defense as to any basis for dismissal beyond "willful violation of a known or written rule." The termination letter identified several written rules which Ms. Watlington had violated, but the express language she quotes in her appeal is derived from the Administrative Code and is not included in the termination letter.

She relies solely on an analogy to this Court's holding in *Timber Ridge v. Caldwell*, 195 N.C. App. 452, 672 S.E.2d 735 (2009), that a landlord wrongly terminated a lease without providing any notice of lease termination as required by the Code of Federal Regulations. 195 N.C. App. at 455, 672 S.E.2d at 737. Setting aside the significant difference

in areas of law, *Timber Ridge* is inapposite because: (1) the record on appeal in that case did not include any notice from which this Court could determine compliance with the relevant law, *id.* at 455, 672 S.E.2d at 737; and (2) the language of the relevant statute required the notice to " 'state the reasons for the landlord's action with enough specificity so as to enable the tenant to prepare a defense[,]' " *id.* at 453, 672 S.E.2d at 736 (quoting 24 C.F.R. § 247.4(a) (2008)), in marked difference to the language of the North Carolina Administrative Code provision pertinent to Ms. Watlington's dismissal.

RCDSS notified Ms. Watlington in its termination letter that it believed she had engaged in "unacceptable personal conduct." It then detailed the specific acts amounting to "unacceptable personal conduct," consistent with 25 N.C. Admin. Code 01I.2308(4)(f). The contested case hearing before the ALJ afforded Ms. Watlington an opportunity to dispute whether those specific acts occurred as a matter of fact and whether they constituted unacceptable personal conduct as a matter of law. The ALJ, in turn, had full authority to conclude as a matter of law that Ms. Watlington's conduct fell within one of the enumerated categories of unacceptable personal conduct. *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. Because the ALJ concluded that each of the acts falling within the category of "willful violation of a known or written work rule" also fell within another category of unacceptable personal conduct, and Ms. Watlington does not argue that those other categories were in error outside of the procedural argument overruled above, we hold that the ALJ fully satisfied the second *Warren* prong. Likewise, because we hold that the second *Warren* prong was satisfied independent of Ms. Watlington's "willful violation of a known or written work rule," we do not reach her argument that her conduct was not "willful" within the meaning of 25 N.C. Admin. Code 1I.2304(b)(4).

*B. Just Cause (*De Novo *Review)*

Subchapter 1I of Title 25 of the North Carolina Administrative Code permits dismissal of a State employee "for a *current* incident of unacceptable personal conduct." 25 N.C. Admin. Code 1I.2304(a) (emphasis added). Ms. Watlington contends that of the six acts concluded to be unacceptable personal conduct, only her acceptance of jewelry was current; as a result, Ms. Watlington reasons, any just cause analysis must focus solely on that act alone. Reviewing the record and applicable law, we disagree.[3]

3. The parties treat the "current-ness" issue as part of *Warren*'s second prong: "whether the employee's conduct falls within one of the categories of unacceptable personal

25 N.C. Admin. Code 1I.2304(a) does not define the word "current." Neither party cites, and we are unable to find, any case law interpreting the term with respect to this specific subchapter of the Administrative Code. A paucity of decisions addresses this term as used in other subsections of the Administrative Code. *See Renfrow v. N.C. Dep't of Revenue*, 245 N.C. App. 443, 448, 782 S.E.2d 379, 382-83 (2016) (interpreting the word "current" as used in 25 N.C. Admin. Code 1J.0608, the subchapter applicable to discipline of state—rather than local government—employees). In *Renfrow*, the Department of Revenue discovered in 2012 that one of its employees had failed to pay $7,107.00 in taxes years earlier, between 2008 and 2010. *Id.* at 445, 782 S.E.2d at 380. In March 2012, the employee met with her supervisor and entered into a payment plan to cover her back taxes. *Id.* at 445, 782 S.E.2d at 380. Nineteen months after the March 2012 meeting, the Department of Revenue effectively dismissed the employee for her failure to comply with tax laws between 2008 and 2010. *Id.* at 445, 782 S.E.2d at 381. We reversed her dismissal after concluding that her acts of unacceptable personal conduct were not "current" per N.C. Admin. Code 1J.0608 "in the absence of *any* explanation for [the Department of Revenue's] nineteen-month delay." *Id.* at 448, 782 S.E.2d at 382 (emphasis in original). We declined to impose a definite limit on the word "current," however, instead agreeing with the Department of Revenue that " '[r]ather than a length of time certain, allowing a reasonable time under the circumstances would seem more appropriate.' " *Id.* at 448, 782 S.E.2d at 382 (alteration in original). We further noted that "[i]n cases like this one, where employee misconduct is not readily discoverable, whether the misconduct is a 'current incident' depends on the amount of time that elapsed between the employer's discovery of the misconduct and the contested disciplinary action." *Id.* at 448, 782 S.E.2d at 382 n.1.

In this case, the ALJ made three findings of fact that, although RCDSS staff were aware of some of the acts concluded to be "unacceptable personal conduct" before the investigation into Ms. Watlington in December 2015, none was known to any staff member with disciplinary

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conduct provided by the Administrative Code." 221 N.C. App. at 383, 726 S.E.2d at 925. We hold that this question more properly falls within the third prong: "whether that misconduct amounted to just cause for the disciplinary action taken." *Id.* at 383, 726 S.E.2d at 925. Our reasoning is simple. Ms. Watlington's conduct, regardless of any temporal considerations, fell within at least one category of "unacceptable personal conduct" in 25 N.C. Admin. Code 1I.2304(b), satisfying the second prong of *Warren*. Whether or not those acts of unacceptable personal conduct justify dismissal, however, is limited by the requirement that they be "current." Thus, the issue of "current-ness" involves only whether the particular act of unacceptable personal conduct may warrant dismissal, *i.e.*, whether the agency terminating employment had just cause to do so.

authority. Ms. Watlington challenges these findings as unsupported by the evidence. But she does not challenge the ALJ's Conclusion of Law 8, which states: "Although some of the above [unacceptable personal] conduct does not appear to be 'current', it was first exposed to management by the December 2015 investigation."[4] Though labeled a conclusion of law, this determination consists solely of a factual finding that management was not apprised of Ms. Watlington's misconduct until December 2015. We treat conclusions of law that are in actuality factual determinations as findings of fact. *Warren*, 221 N.C. App. at 379, 726 S.E.2d at 923; *see also In re Simpson*, 211 N.C. App. 483, 487-88, 711 S.E.2d 165, 169 (2011) ("When this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review." (citations omitted)).

Applied to the factual question of when RCDSS staff with disciplinary authority became aware of the alleged acts of unacceptable personal conduct, the "whole record test" requires "examination of whether the [ALJ's] unchallenged findings in the [ALJ's order] support the conclusion that 'just cause' existed to discharge [Ms. Watlington] from employment on grounds of unacceptable personal conduct[.]" *Gray v. Orange Cty. Health Dep't*, 119 N.C. App. 62, 75, 457 S.E.2d 892, 901 (1995). Because Conclusion of Law 8 is an unchallenged factual finding, it is binding on this Court. *Blackburn*, 246 N.C. App. at 210, 784 S.E.2d at 519; *see also Watlington I*, ___ N.C. App. at ___, 799 S.E.2d at 404 (holding Finding of Fact 13 in the first final decision entered by the ALJ as binding because it went unchallenged by either party on appeal).

Even if we were to assume *arguendo* that Conclusion of Law 8 is not binding, the evidence supports findings that at least two of the relevant acts of misconduct were unknown to management staff of RCDSS until December 2015: (1) the acceptance of jewelry during a case visit between a parent and a child under Ms. Watlington's supervision; and (2) the receipt of a $60 loan from a foster parent of a child under her supervision. It is not necessary that every act committed by Ms. Watlington be "current" so long as at least one instance of unacceptable personal conduct is, as "[o]ne act of [unacceptable personal conduct] presents 'just cause' for any discipline, up to and including dismissal." *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005) (citations omitted).

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4. On appeal, Ms. Watlington could have challenged Conclusion of Law 8 as either: (1) a conclusion unsupported by any factual findings; or (2) a mislabeled finding of fact unsupported by the evidence. She did neither, however.

It is undisputed that Ms. Watlington accepted the jewelry in December 2015. It is also undisputed that Ms. Watlington accepted the loan between two and three years earlier after she commented to a foster parent that she could not pay her power bill. But the testimony by RCDSS's then-director indicates that the loan—which Ms. Watlington admitted she had not paid back at the time of her dismissal—was not disclosed to management until December 2015 during the internal investigation; while Ms. Watlington's immediate supervisor addressed other issues in an 18-month period prior to December 2015, those issues arose outside the timeframe of the loan. The director testified that the unspecified issues addressed by Ms. Watlington's intermediate supervisor during the prior 18 months were not contained within the acts of unacceptable personal conduct listed in the pre-dismissal conference letter. The director further testified that the supervisor had previously addressed "performance issues, and the matter at hand [in the pre-dismissal conference] was a personal conduct issue." Finally, the director, when asked if she had participated in any prior discipline of Ms. Watlington, testified that she had only "overhear[ed] a conversation between [the intermediate supervisor] and Ms. Watlington when she was agitated[.]"[5] This testimony is "relevant evidence a reasonable mind might accept as adequate to support [the ALJ's] conclusion[,]" *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (citation and internal quotation marks omitted), and therefore sufficient to sustain his factual finding that persons with disciplinary authority were unaware of these prior acts of unacceptable personal conduct until December 2015.

We are therefore left with the question of whether RCDSS's disciplinary actions concerning Ms. Watlington's prior acts of misconduct were taken within a "reasonable time under the circumstances." *Renfrow*, 245 N.C. App. at 448, 782 S.E.2d at 382 (internal quotation marks omitted); *see also Hershner v. N.C. Dep't of Admin.*, 232 N.C. App. 552, 555, 754 S.E.2d 847, 849-50 (2014) (holding that unchallenged findings supported an ALJ's conclusions of law even where the challenged findings were assumed to be unsupported by the evidence). We hold that they were. The evidence and factual finding in Conclusion of Law 8 establish that RCDSS management first became aware of Ms. Watlington's prior misconduct during the investigation in December 2015. Two days

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5. Ms. Watlington's counsel objected to "discussion of that conversation as hearsay[,]" and subsequent objections and a motion to strike further questioning and testimony concerning the conversation were sustained. That the director's only prior knowledge of a disciplinary matter regarding Ms. Watlington was witnessing a conversation, however, is not hearsay.

after placing her on leave and starting its investigation, RCDSS held a pre-dismissal conference with Ms. Watlington, wherein she admitted to the acts of unacceptable personal conduct. Three days after the conference, Ms. Watlington was dismissed. This five-day period—from management's discovery of these acts of unacceptable personal conduct to Ms. Watlington's dismissal—constitutes a "reasonable time under the circumstances," *id.* at 448, 782 S.E.2d at 382, and her acts were therefore "current" within the meaning of 25 N.C. Admin. Code 1I.2304(a).

Ms. Watlington contends that the language of the administrative code expressly prohibits RCDSS from terminating her based on any prior acts of misconduct, regardless of when they became known to management, citing *Renfrow*. We disagree, in part because *Renfrow* is inapposite, as it interpreted the "current" nature of acts of unacceptable personal conduct by examining the time between management's knowledge and the employee's eventual dismissal, as opposed to the time between the conduct and the employee's dismissal. 245 N.C. App. at 448, 782 S.E.2d at 382. Also, Ms. Watlington's interpretation of the word "current" would lead to illogical outcomes, and this Court will not adopt statutory construction that "will lead to absurd results[ ] or contravene the manifest purpose of the Legislature[.]" *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citations and internal quotation marks omitted). For example, if the word "current" depends upon when personal misconduct occurred, the statute would immunize the clever employee who embezzles money on a single occasion and successfully hides that fact from management for a lengthy period of time. We therefore reject this interpretation and Ms. Watlington's argument on this point.

Ms. Watlington next contends that RCDSS was without just cause to dismiss her, comparing the misconduct in this case to the misconduct in a plethora of cases in which our appellate courts have held just cause for dismissal existed. This formulaic approach is unpersuasive, as just cause "is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900 (internal quotation marks and citations omitted).

Turning to the specific "facts and circumstances of [this] individual case[,]" *id.* at 669, 599 S.E.2d at 900, this Court has already affirmed the ALJ's finding that Ms. Watlington: (1) accepted a $60 loan from an RCDSS client; (2) used $6 of a minor child's money to purchase food for herself and paid the money back a week later; (3) accepted food from foster parents on multiple occasions; (4) gave a foster family a bassinet

without authorization, though she later retrieved it once told it was a problem; and (5) accepted a gift of earrings from a foster parent and minor child, which was later returned once she was notified it was an issue. Broadly speaking, these acts display a repeated inclination by Ms. Watlington to accept gifts from or make gifts to RCDSS clients in contravention of RCDSS policy; while she did return some items, she appears to have done so only after being confronted by her supervisor. The ALJ correctly considered this conduct in the context of Ms. Watlington's duties, pointing out that her direct involvement with minor children "creat[ed] a heightened risk of legal and financial exposure for [RCDSS] upon her engagement in unacceptable personal conduct during the performance of her duties." He also correctly noted that Ms. Watlington's "actions can easily be misconceived by citizens to be the actions of the department as a whole[,]" and that "[i]n some instances, it is the appearance of an impropriety, as much as the impropriety itself, that has the potential of degrading [RCDSS's] reputation."[6]

We agree with these observations by the ALJ. They apply to each of Ms. Watlington's acts of unacceptable personal conduct, whether considered collectively or individually, and, on *de novo* review, we hold that the ALJ properly concluded RCDSS possessed just cause to dismiss Ms. Watlington for her multiple acts of current unacceptable personal conduct.

Although we hold RCDSS had just cause to dismiss Ms. Watlington, her argument that her conduct is not as severe as that in other cases where just cause existed is not a specious one. The record does not disclose that she committed a crime, caused anyone physical or emotional harm, or acted with evil or calamitous intent. But Ms. Watlington played a critical role in supervising and reporting on visitations with children in RCDSS custody, and her reports were relayed by social workers to trial courts tasked with determining the children's fates. The State's intercession into the relationship between a parent and a child, through the acts of its employees, implicates the "freedom of personal choice in matters

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6. Ms. Watlington argues that these conclusions are contrary to the ALJ's finding in the order affirmed in part, reversed in part, and remanded in *Watlington I* that found no actual harm to RCDSS as a result of her actions. The absence of actual harm, however, does not preclude the ALJ from finding the existence of the potential for harm from the evidence, and she does not argue that repeated acts with the potential to cause harm cannot give rise to just cause for dismissal. Further, we note that there is evidence in the record to support the concerns identified by the ALJ: the employee orientation materials admitted into evidence acknowledge that ethical conduct is imperative "[b]ecause our reputation is important and the public is watching. We need to continue to improve our image."

of family life[,]" *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 606 (1982), a "fundamental liberty interest [that] includes natural parents' ability to provide and maintain the care, custody and management of their child." *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397 (1992). And "[t]he State of North Carolina . . . must remain a responsible steward of the public trust[,]" *Peace v. Employment Sec. Comm'n of North Carolina*, 349 N.C. 315, 327, 507 S.E.2d 272, 281 (1998), particularly when "provid[ing] . . . services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence." N.C. Gen. Stat. § 7B-100(3) (2017). Considered in this context,[7] Ms. Watlington's unacceptable personal conduct, albeit not necessarily malicious or corrupt, could erode the public's faith in RCDSS and provide the requisite cause to justify dismissal.

CONCLUSION

For the foregoing reasons, we affirm the ALJ's order concluding RCDSS possessed just cause to terminate Ms. Watlington.

AFFIRMED.

Judges ELMORE and MURPHY concur.

7. Though we note the general significance of child welfare agencies and affirm the ALJ's conclusion that Ms. Watlington's specific acts violated her agency's personnel policies and justified her dismissal, we acknowledge that other counties may choose to protect the public trust by drafting rules different from RCDSS, and nothing in this opinion should be read to hinder or limit such a determination. Again, just cause "is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900 (internal quotation marks and citations omitted).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 2 October 2018)

BIGGS v. BROOKS No. 18-192	Durham (15CVS2972)	Dismissed
BLOCK v. BLOCK No. 18-200	Scotland (15CVD166)	Affirmed
DRAKEFORD v. BAEZ No. 18-181	Mecklenburg (13CVD11939)	Affirmed
GAINES v. GAINES No. 17-1114	Iredell (11CVD2012)	Affirmed as modified
GUIDOTTI v. MOORE No. 18-221	Bladen (15CVS108)	Affirmed
IN RE C.S. No. 18-450	New Hanover (17JA316)	Reversed
IN RE E.G.B. No. 18-329	Haywood (16JA6) (16JA7)	Affirmed
IN RE L.L. No. 18-168	McDowell (17JA73)	Vacated and Remanded
IN RE N.J.Y. No. 18-362	Guilford (15JT314-316)	Affirmed
IN RE R.S.B. No. 18-231	New Hanover (16JT29)	Dismissed
PAWN & GIFTS, INC. v. BRADLEY No. 18-201	Sampson (16CVD1422)	Affirmed
SMITH v. SMITH No. 18-59	Mecklenburg (09CVD11064)	Reversed and Remanded
STATE v. BARNARD No. 18-208	Mecklenburg (15CRS237274)	No Error
STATE v. BRIGGS No. 18-22	Bladen (16CRS51073)	No Error
STATE v. BROOKS No. 18-64	Durham (15CRS1028-29) (15CRS52051)	HARMLESS ERROR

STATE v. BROWN No. 18-356	Mecklenburg (17CRS213900)	No Error
STATE v. COMBS No. 18-69	Tyrrell (17CRS50015)	Vacated
STATE v. CROWDER No. 18-185	Cabarrus (16CRS52336)	Affirmed
STATE v. DAVIS No. 17-1340	Mecklenburg (16CRS209687) (16CRS209692-94) (16CRS22639)	No Error
STATE v. DREHER No. 18-116	Buncombe (15CRS85127)	Reversed and Remanded
STATE v. GUERRETTE No. 18-24	New Hanover (16CRS57782-83)	Reversed and Remanded
STATE v. HELMS No. 18-12	Union (15CRS51369)	No Error
STATE v. JORDAN No. 17-1315	Perquimans (15CRS50368)	Affirmed
STATE v. KILLETTE No. 18-26	Johnston (14CRS55188) (15CRS53276)	Dismissed
STATE v. LaCLAIRE No. 17-1122	Robeson (16CRS50420)	Dismissed; Remanded for Correction of Clerical Error.
STATE v. LEMM No. 18-135	Wake (15CRS227310)	NO PLAIN ERROR
STATE v. OWENBY No. 18-151	Iredell (16CRS52772)	No Error
STATE v. PARKER No. 17-1226	Wake (14CRS202985) (14CRS2274)	No Error
STATE v. POLE No. 17-1393	New Hanover (13CRS60326)	No Error
STATE v. ROUSSEAU No. 18-89	Guilford (14CRS92852) (15CRS23057)	No Error

STATE v. SANDERS No. 17-1399	Johnston (17CRS52933)	Affirmed
STATE v. SPICER No. 18-80	Catawba (09CRS57498)	Affirmed
STATE v. TERRY No. 18-259	Randolph (16CRS54000)	No Error

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